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The Federal Government's Presumption in Procurement Affirmative Action Programs  
that Americans of Thirty-Seven Nationalities or Ethnicities are Disadvantaged is on a  
Collision Course with Strict Scrutiny

By

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## I. Introduction

The United States Supreme Court's recently reversed itself and dismissed the writ of certiorari it had previously granted as improvident based on a lack of standing for the petitioner in *Adarand Constructors, Inc. v. Mineta*<sup>1</sup> ("Adarand VII"). This left unanswered the question that the Supreme Court appeared anxious to answer when it had granted the writ of certiorari – whether the federal government's procurement affirmative action programs withstand strict scrutiny as is required under *Adarand Constructors, Inc. v. Pena*<sup>2</sup> ("Adarand III")?

The Supreme Court in *Adarand III* held federal programs that apply favorable treatment to minority enterprises must survive a strict scrutiny standard of review under the Constitution. Since that holding, the federal government has taken some steps in an attempt to bring its procurement regulations into compliance with this standard of review. However, these changes do not address a fundamental problem associated with affirmative action procurement programs – the haphazard manner in which minority groups have been chosen to participate in the programs.

In order for a governmental affirmative action procurement program to pass constitutional muster under a strict scrutiny standard of review, the government must be able to prove that it has a compelling governmental interest in treating certain minority groups more favorably than the populace as a whole and that the means chosen to address the compelling interest are narrowly tailored. However, the government has not established a compelling interest, or sometimes even a rational interest, when

determining that specific minority groups qualify for preferential treatment while other minority groups do not.

For example, despite the fact the average levels of education and prosperity for members of the Asian American and Pacific Islanders ethnic groups are higher than the average levels for Americans as a whole, the Small Business Administration (“SBA”) has determined that members of these ethnic groups are presumptively disadvantaged and eligible for participation in affirmative action procurement programs. On the other hand, the SBA rejected a petition for presumptive eligibility for Iranian Americans in 1987, despite the fact the petition addressed the fact Iranian Americans ranked extremely low on average household income, averaging only slightly above poverty level and ranking 38th among 42 foreign born groups.<sup>3</sup>

This contrast highlights the initial problem with revisions that have been made to the procurement affirmative action programs – they have not addressed what governmental compelling interests are being furthered by the selection of certain minority groups for eligibility in the programs. While this issue frequently is addressed in terms of the impact on the African American or Hispanic American communities, it is much more complicated. The federal government rebuttably presumes that members of the following groups representing thirty-seven nationalities or ethnicities are socially and economically disadvantaged for purposes of numerous affirmative action procurement programs: “Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S.

Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal).<sup>4</sup>

In all cases, the SBA’s selection of minority groups to be placed on the list of those that are given a presumption of disadvantage for purposes of procurement affirmative action programs occurred prior to the *Adarand III* holding. The regulatory standard used to guide the SBA’s selection of the groups makes no mention of the compelling interests of the government. It does not even require the government to initiate the placement action. Instead, in order to be selected to be placed on the list, “[r]epresentatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias” must petition the SBA for inclusion.<sup>5</sup> Thus, the initial step for determination of presumptive disadvantage makes no mention of the government or the government’s interests.

Upon receipt of such an application, the SBA must determine whether the group has suffered prejudice, bias, or discriminatory practices.<sup>6</sup> If it has, the SBA next determines whether the conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act.<sup>7</sup> The groups Congress named in the Small Business Act are “Black Americans, Hispanic Americans, Native Americans, [and] Asian-Pacific Americans.”<sup>8</sup> Last, the SBA determines whether the conditions “have produced impediments in the business world for members of the group over which they have no control and which are not common to

small business owners generally.”<sup>9</sup> The process allows for no consideration of the government’s interests in a group’s selection for presumptive eligibility. It also provides no process for periodically evaluating groups to determine if the conditions that the SBA previously had found to exist are still present to an extent that the group’s presumption of disadvantage is still warranted.

In the summer of 2003, the Supreme Court issued two opinions concerning the admissions policies at the University of Michigan’s undergraduate and law schools that provided further guidance concerning the constitutional requirements for a race-conscious government program.<sup>10</sup> These schools’ admissions policies – which were dissimilar in many respects – both treated applications submitted by members of certain minority groups more favorably than applications submitted by non-minorities. In analyzing the constitutionality of the two policies, the Court was clear in its rejection of affirmative action programs that blindly offer preferential treatment to certain groups based only on race or ethnicity without any individualized consideration.<sup>11</sup> The Court also made it clear that a race-conscious program must include a method for placing a durational limit on the program. The Court stated that this could take the form of a sunset provision or periodic examinations of the status of the groups selected for preferential treatment.<sup>12</sup> Given the manner in which the federal government has implemented its affirmative action procurement programs, the Court’s holdings in the University of Michigan cases further call into question whether these programs pass constitutional muster.

II. The History Of Affirmative Action In Federal Procurement Prior To *Adarand III*

A. The development of non-discrimination requirements in federal contracting prior to the Civil Rights Act of 1964

A complete understanding of the federal government's affirmative action procurement programs requires consideration of the genesis of such programs that occurred during President Franklin Roosevelt's administration. In 1941, President Roosevelt issued an executive order that prohibited federal government contractors from discriminating on the bases of race, national origin, and religion and set up a committee to investigate allegations of such discrimination.<sup>13</sup> The Truman and Eisenhower administrations issued similar executive orders.<sup>14</sup> President Eisenhower also issued a separate executive order establishing the Government Contract Committee, which was given specific guidance on how to encourage and enforce compliance with the non-discrimination policy.

In 1956, the Government Contract Committee required government contractors to track the number of employees who were "Negro," as well as those who were members of other minority groups.<sup>15</sup> The instructions on this survey further asked the contractors to "to furnish employment statistics" for members of other minority groups if they had a sizeable number of such employees.<sup>16</sup>

During this same period, the Small Business Act of 1953 created the Small Business Administration (SBA) to aid, counsel, assist, and protect the interests of small-business concerns.<sup>17</sup> Section 8(a) of the Act authorized the SBA to "provide technical

and managerial aids to small-business concerns,” but made no mention of socially or economically disadvantaged businesses.<sup>18</sup>

In 1961, the Kennedy Administration abolished the Government Contract Committee and established the President’s Committee on Equal Employment Opportunity (“PCEEO”) in its place.<sup>19</sup> The order required every government contract to include a clause that prohibited contractor discrimination based on “race, creed, color, or national origin” and to take “affirmative action” to ensure that applicants and employees were treated without regard to such characteristics.<sup>20</sup>

The PCEEO created Form 40, requiring contractors to track the levels of their minority employees.<sup>21</sup> The form continued the listing of “Negro” as a specific minority category to be tracked, but also added “Spanish-American,” “Oriental,” and “American Indian.”<sup>22</sup> While the “American Indian” category was added without outside influence, the addition of the “Spanish-American” and “Oriental” categories occurred only after representatives from those groups lobbied for inclusion among those requiring contractor monitoring.<sup>23</sup> There is no evidence that these ethnic groups were selected as a result of studies establishing discrimination against them in federal government procurement actions. Instead, the government apparently decided to track these groups based on general notions of groups who had suffered from discrimination.

## B. The Civil Rights Act of 1964

The Civil Rights Act of 1964 became the first public law to prohibit employment discrimination by employers. For government contractors who employed more than 100 employees, it superseded reporting procedures directed by past executive orders. Specifically, Title VII of the Act stated that “it shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual” regarding terms of employment “because of such individual’s race, color, religion, sex, or national origin.”<sup>24</sup>

Title VII also mandated that the Equal Employment Opportunity Commission (“EEOC”) require all employers with over 100 employees maintain records “reasonably necessary to carry out the purpose of this title.”<sup>25</sup> In carrying out the requirement that employers maintain records of the ethnicity of their employees, the EEOC essentially adopted the four minority groups that the PCEEO had required government contractors to track – “blacks” (formerly categorized by the PCEEO as “Negroes”), “Spanish-Americans,” “Orientals” and “American Indians.”<sup>26</sup> In addition, the EEOC required a further breaking down of these groups into male and female sub-categories.<sup>27</sup>

Because almost all the congressional debate over the Civil Rights Act focused on African Americans, it is unclear why the EEOC mandated employers to report the number of employees that fell into the three other minority groups other than the fact the PCEEO had broken down its reporting requirements in this manner.<sup>28</sup> In explaining the reporting requirements, the EEOC’s Notice of Proposed Regulation stated that the reporting form that employers would be required to submit would be nearly identical to the previous PCEEO form.<sup>29</sup> Thus, while Congress and the EEOC had focused little

attention to the level of past discrimination experienced by Hispanic American, Asian American and Native American employees, they, along with African Americans, became the first officially tracked and specifically protected minorities.

The EEOC required employers to track the racial identification of employees falling into the four minority categories using a form called EEO-1. Employers were directed to complete this form by visual surveys of the work force, or, if permitted by state law, by the maintenance of post-employment records as to the identity of employees.<sup>30</sup> Employers were discouraged from directly asking employees their racial or ethnic identity.<sup>31</sup> Thus, for the most part, employers were directed to report the number of their employees who visually appeared to fall into one of the four categories. This gave rise to the identification of members of racial and ethnic groups almost exclusively on appearance rather than upon the socio-economic backgrounds from which the individuals came.

C. Section 8(a) of the Small Business Act s used to assist small businesses owned by disadvantaged persons

In 1970, President Nixon issued Executive Order 11518, which began, in part, by citing the language of section 8(a) of the Small Business Act of 1958<sup>32</sup> that called on the SBA to “aid, counsel, assist and protect” the interests of small business concerns.<sup>33</sup> With regard to minority groups, the executive order then required the SBA to “consider the needs and interests of minority-owned small business concerns and of members of minority groups seeking entry into the business community.”<sup>34</sup>

Soon after the executive order was issued, and using it as the basis for action, the SBA promulgated regulations under the authority of section 8(a) of the Act aimed at assisting small business concerns owned by disadvantaged individuals.<sup>35</sup> Even though the Act never called for assistance to disadvantaged persons, the new regulations created an “8(a) program” which was charged with helping businesses owned by disadvantaged individuals to become self-sufficient and viable through awards of federal government contracts.<sup>36</sup> The SBA limited eligibility for the program to small businesses owned by socially or economically disadvantaged persons.<sup>37</sup> The regulations did not state who qualified as socially or economically disadvantaged persons, but regulations noted that “[t]his category often includes, but is not restricted to, Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos, and Aleuts.”<sup>38</sup>

D. The SBA’s presumption of social and economic disadvantage

In 1973, the SBA formally defined socially or economically disadvantaged individuals as:<sup>39</sup>

[P]ersons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts . . .

The SBA and the regulations provided no explanation as to why members of these minority groups were presumed to be socially and economically disadvantaged and other groups were not. There were no hearings conducted on the issue and no evidence was

presented of members of these groups being discriminated against to show that a presumption of disadvantage was warranted.<sup>40</sup> Given the manner in which this area of the law was developing, it was almost inevitable that these groups would be presumed disadvantaged, since they had been listed previously as minority groups that had suffered from discrimination.

E. Fullilove v. Klutznick

In 1977, Congress enacted the minority business enterprise (“MBE”) provision of the Public Works Employment Act.<sup>41</sup> This provision required that before any grant was made under the Act for a local public works project, the grantee had to assure the Department of Commerce that at least ten percent of the grant’s amount was to be expended for minority business enterprises.<sup>42</sup> The provision then defined a minority business enterprise as one that is at least half owned by members of the following minority groups: “citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.”<sup>43</sup>

On November 30, 1977, several contracting companies filed a complaint in district court seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision.<sup>44</sup> The complaint alleged that the MBE provision violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory anti-discrimination provisions.<sup>45</sup> The district court upheld the validity of the MBE program and denied the injunctive relief sought<sup>46</sup> and the court of appeals affirmed this holding.<sup>47</sup> The non-MBE contractors appealed these decisions to the Supreme Court, and, in *Fullilove v. Klutznick*, the Court

affirmed the findings of the lower courts and held that the MBE program was not unconstitutional.<sup>48</sup>

The Supreme Court in *Fullilove* failed to reach a consensus opinion on what standard of review to use when deciding the constitutionality of the MBE program – intermediate scrutiny, strict scrutiny or some other standard. Chief Justice Burger, joined by Justices White and Powell, wrote the principal opinion in which the program was found constitutional without resorting to either intermediate or strict scrutiny.<sup>49</sup> Instead, Chief Justice Burger held that the racial classification systems should be closely examined while giving the “appropriate deference” to congressional action aimed at enforcing the equal protection guarantees of the Fourteenth Amendment and the Fifth Amendment’s Due Process Clause.<sup>50</sup> According to Chief Justice Burger, this was accomplished by determining whether the objectives of the legislation were within the power of Congress, and, if so, whether Congress used permissible means within the constraints of the Due Process Clause in carrying out the objectives.<sup>51</sup> When the Chief Justice applied this test to the MBE program as Congress had implemented it, he found it to pass constitutional muster.<sup>52</sup> In applying the test, the Chief Justice stated that a program such as the MBE program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination must be narrowly tailored to the achievement of that goal.<sup>53</sup> Thus, the principal opinion employed one prong of the strict scrutiny standard of review.

In a concurring opinion, Justice Powell elaborated on his finding that the program was constitutional by analyzing it using a strict scrutiny standard of review – he found that the racial classification system employed by the MBE program to be constitutional

because it was a necessary means of advancing a compelling governmental interest and the means selected to address this interest were narrowly drawn to fulfill the governmental purpose.<sup>54</sup> Justices Marshall, Brennan and Blackmun concurred with Chief Justice Burger and Justice Powell in finding the program constitutional, but they analyzed the program using intermediate scrutiny – they found the racial classification system employed by the MBE program to be constitutional because it served important governmental objectives and was substantially related to achievement of those objectives.<sup>55</sup> Thus, while the Court differed on the standard used to make the determination, it found the MBE program constitutional, with only Justices Rehnquist, Stewart and Stevens<sup>56</sup> dissenting from this finding.<sup>57</sup>

The majority hardly addressed the issue of which minority groups were selected for favorable treatment. In assessing whether the MBE program was sufficiently narrowly tailored and not over-inclusive, Chief Justice Burger stated that the program would be unconstitutional if it benefited businesses owned by the enumerated minority groups without a justification on the basis of competitive criteria or as a remedy for prior discrimination.<sup>58</sup> However, Chief Justice Burger did not state what justification had been presented such that the listed minority groups should be granted the favorable treatment. His only comment on the issue was in a footnote in which he said, “The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination.”<sup>59</sup> He offered no elaboration on why Congress did not need to justify or substantiate its decision that ‘Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts’ were unable to compete adequately as a result of past discrimination and should be treated preferentially.<sup>60</sup> Since the petitioners “did not press

any challenge to Congress' classification categories in the Court of Appeals," Chief Justice Burger accepted at face value that the selection of these particular minority groups by Congress passed constitutional muster.<sup>61</sup>

Instead of addressing which minority groups were selected for inclusion in the MBE program, the Justices who found the MBE program constitutional seemed to focus on the same issue Congress had – discrimination against African Americans. For example, Justice Marshall summed up his concurring opinion in the following manner:<sup>62</sup>

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing to take steps to open those doors.

While these sentiments seem perfectly appropriate in upholding the constitutionality of a program designed to benefit African Americans, they do not address the issue of why the other enumerated minority groups should be afforded the same preferential treatment.

The dissenting Justices in *Fullilove* did examine to a limited extent the issue of the seemingly random manner in which groups were selected for inclusion in the MBE program. For example, Justice Stevens found that Congress used "[n]o economic, social, geographical, or historical criteria" when it decided which minority groups would be included in the preferred class, and he strongly criticized Congress for not explaining why it chose those groups that it did.<sup>63</sup> In addition, Justice Stewart stated, "[I]t constitutes far too gross an oversimplification to assume that every single Negro, Spanish-speaking citizen, Oriental, Indian, Eskimo, and Aleut potentially interested in

construction contracting currently suffers from the effects of past or present racial discrimination.”<sup>64</sup>

In comparing those minority groups that have been selected in the past for preferential treatment in federal procurement programs and those that currently receive such treatment, the irrationality of the selection process sometimes becomes apparent. For example, in the appendix to his *Fulliove* opinion, Chief Justice Burger included paragraphs from a guideline issued by the Department of Commerce entitled “Economic Development Administration Minority Business Enterprise Technical Bulletin 1,” which provided more details on the implementation of the MBE program.<sup>65</sup> This bulletin defined the minority group “Oriental” in the following manner:<sup>66</sup>

Oriental – An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

Thus, an individual of a culture, origin or parentage traceable to Afghanistan would have been eligible for favorable treatment under the MBE program after it was implemented in 1977, but would not be so fortunate under the current federal procurement affirmative action programs.<sup>67</sup> It almost goes without saying that there is no evidence that the plight of such individuals has improved since the period prior to the Soviet Union’s invasion of Afghanistan to the present, yet they no longer warrant preferential treatment in the procurement system.

F. Statutory implementation of section 8(a) of the Small Business Act – the Business Development program

Soon after implementation of the MBE program, Congress passed amendments to the Small Business Investment Act of 1958,<sup>68</sup> which for the first time statutorily implemented the 8(a) program. Responding to its finding that minority group members including, but not limited to, Black Americans, Hispanic Americans and Native Americans had been subjected to discriminatory treatment, Congress expanded the 8(a) program to include the promotion of federal governmental business with small companies owned by socially and economically disadvantaged individuals.<sup>69</sup> Through the expanded program, the SBA was given the duty of entering into contracts with governmental agencies and then arranging for the performance of the contracts through subcontracts with socially and economically disadvantaged small businesses.<sup>70</sup> Such small businesses were defined as those majority-owned by individuals: (1) who had been subjected to racial or ethnic prejudice, which was called socially disadvantaged; and (2) whose ability to compete in the free enterprise system had been impaired due to being socially disadvantaged, which was called economically disadvantaged.<sup>71</sup> In addition to the moniker the 8(a) program, this program also became known as the Business Development (“BD”) program.

In implementing the BD program, the SBA considered members of the minority groups listed in the amendment to be socially disadvantaged, as well as members of any other minority group that the SBA administratively determined was suffering from social disadvantage.<sup>72</sup> If an individual not a member of a listed minority group wanted to be considered socially disadvantaged under the BD program, he or she had to prove that

status by clear and convincing evidence.<sup>73</sup> To qualify for the BD program, such an individual also had to prove economic disadvantage in accordance with criteria that analyzed the individual's financial condition.<sup>74</sup>

G. Statutory implementation of sections 8(d) and 8(f) of the Small Business Act – the Small Disadvantaged Business program

At the same time it amended section 8(a) of the Act, Congress also amended section 8(d) of the Act by stating that members of the three designated minority groups, members of other unspecified minority groups, and any other individual that the SBA found to be disadvantaged under the 8(a) program would be presumed both socially *and economically disadvantaged* for purposes of section 8(d).<sup>75</sup> The amended section also required that most federal procurement contracts exceeding \$10,000 in value include a clause stating that small business concerns owned and controlled by socially and economically disadvantaged individuals would be given the “maximum practicable opportunity to participate” in government contracts, and that subcontract awards should be made in a manner consistent with this policy “to the fullest extent consistent with . . . efficient performance.”<sup>76</sup> With regard to most construction contracts over \$1,000,000 and other contracts over \$500,000, the amended statute required those contractors submitting a subcontracting plan to disclose what percentage of their subcontracted work was to go to small disadvantaged companies.<sup>77</sup>

In addition, Congress further amended the Act by adding to it a new provision, section 8(f). This provision directed federal agencies to establish goals for the contracts with values over \$10,000 that were to be awarded to small disadvantaged businesses.<sup>78</sup>

This section and the section amending section 8(d) of the Act brought into existence the Small Disadvantaged Business (“SDB”) program, otherwise known as the 8(d) program.<sup>79</sup>

For both the 8(a) and the 8(d) programs, the presumptions of disadvantage could be rebutted by a third party presenting evidence suggesting that the participant was not, in fact, either economically or socially disadvantaged.<sup>80</sup>

No Asian minority groups were among those Congress specifically listed as being presumptively disadvantaged. The legislative history of the 1978 amendments gives no indication why Congress decided “Oriental” minority groups would be eligible to participate in the MBE program, but not be given a presumption of disadvantage for the 8(a) and 8(d) programs.<sup>81</sup> Whatever the reasoning for the initial decision not to have Asian minority groups included among the groups that Congress specifically listed as qualifying for the presumption, political pressure mounted quickly and Congress added “Asian Pacific Americans” to the list in 1980 without any explanation or justification for their inclusion or prior exclusion.<sup>82</sup>

H. Petitions by minority groups for inclusion on the list of those deemed presumptively socially and economically disadvantaged

The 1978 amendments gave the SBA the authority to determine which minority groups qualified as being presumptively disadvantaged.<sup>83</sup> When the SBA implemented the amendments, they set up a process for making this determination that required minority groups to make an “adequate showing” of racial, ethnic or cultural bias against the group that resulted in economic deprivation of the type experienced by Black

Americans, Hispanic Americans and Native Americans and which have impeded the group's ability to compete in the business world.<sup>84</sup>

1. Hasidic Jews

Minority groups soon began petitioning the SBA for inclusion on the list of those deemed presumptively socially and economically disadvantaged. In 1980, Hasidic Jews petitioned the SBA for inclusion, but were denied even though the SBA found overwhelming evidence of discriminatory treatment, because the SBA felt it could not confer disadvantaged status on a religious group.<sup>85</sup> The SBA's decision is puzzling in light of the treatment of Hasidic Jews by the Department of Commerce's Office of Minority Business Enterprise (now called the Minority Business Development Agency ("MBDA")). The MBDA, which was created by executive order in 1969<sup>86</sup> and charged by a subsequent executive order in 1971<sup>87</sup> with strengthening businesses owned or controlled by one or more *socially or economically disadvantaged persons*, included Hasidic Jews among the minority groups suffering from such a disadvantage.<sup>88</sup> It makes no sense that a minority group considered socially and economically disadvantaged for one government business development program was deemed ineligible for a rebuttal presumption of that designation for proposes of SBA-administered business development programs.

## 2. Asian Indians

In 1982, the “Asian Indian” minority group fared better than the Hasidic Jews when the SBA affirmatively responded to a petition by the National Association of Americans of Asian Indian Descent and seven individual businessmen of Asian Indian descent for inclusion among those minority groups presumed disadvantaged.<sup>89</sup> The SBA ultimately determined that members of this minority group who were to be afforded presumed preferential treatment consisted of American citizens of Indian, Pakistani, or Bangladeshi origin.<sup>90</sup> The inclusion of those of Pakistani or Bangladeshi origins makes little sense in light of the fact the SBA in its notice for comments on the issue defined the Asian Indian minority group as consisting of those “who trace their national origin to India.”<sup>91</sup> The SBA offered no explanation as to why eligibility for inclusion was expanded after the notice for comments was published.<sup>92</sup>

The SBA based its Asian Indian inclusion decision on evidence of discrimination against the group and the fact the group “owned proportionately fewer businesses and accounted for proportionately lesser gross receipts” than Asian Pacific Americans, a group designated by Congress “as a presumptively socially disadvantaged group.”<sup>93</sup> Thus, the rationale, in part, seemed to be that since the group was in worse economic condition than a group Congress specifically included among those presumed disadvantaged – Asian Pacific Americans – inclusion of the Asian Indian minority group on the list was justified. This ignored the fact that Congress had added Asian Pacific Americans to the list without explanation or justification.<sup>94</sup>

### 3. The expansion of the definition of Asian Pacific Americans and Subcontinent Asian Americans

In 1989, the SBA again amended its section 8(a) regulations by expanding the definition of Asian Pacific Americans to include individuals with origins from “Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiribati, Tuvalu, or Nauru.”<sup>95</sup> The SBA also expanded the definition of “Subcontinent Asian Americans,” and stated that the group consists of individuals with origins from “India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal.”<sup>96</sup> The SBA’s only rationale for the additions was its belief that such individuals shared “similar culture, heritage and physical characteristics with people from those countries that were previously included.”<sup>97</sup> In addition, for section 8(a) purposes, the SBA stated that these minority groups and the other listed minority groups were “presumed socially disadvantaged,” as opposed to “considered socially disadvantaged” as had been the case previously.<sup>98</sup>

The SBA’s ongoing expansion of the minority groups that were presumed socially disadvantaged was occurring without any justification, with the presumption specifically being applied for both section 8(a) and 8(d) purposes. The SBA offered no explanation why the new groups qualified for preferential treatment, but few people seemed to notice the changes being made. Of those that did comment on the proposed changes, most were concerned with the lack of justification – of the ten comments received that addressed the

changes discussed above, including the expansion of those considered to be Asian Pacific Americans or Subcontinent Asian Americans, seven opposed the changes in part because of the lack of explanation.<sup>99</sup>

I. *City of Richmond v. J.A. Croson Co.*

In 1989, the Supreme Court revisited the issue of racial preferences in government contracting in *City of Richmond v. J.A. Croson Co.* (“*Croson*”).<sup>100</sup> In 1983, the City of Richmond had adopted a plan, strikingly similar to the MBE program that had been found constitutional in *Fullilove*, that required non-minority-owned prime contractors awarded municipal construction contracts to subcontract at least thirty percent of the dollar amount of each contract to Minority Business Enterprises (“MBEP”).<sup>101</sup> MBEPs were to be businesses majority-owned by United States citizens who were “Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.”<sup>102</sup> Richmond enacted the plan as a remedial measure with the intention of increasing the use of MBEPs on municipal construction projects.<sup>103</sup> Only if MBEPs were unavailable or unwilling to participate on a construction project at a thirty percent level, and a waiver was granted by the city certifying that fact, could a prime contractor not set-aside thirty percent of a construction projects for MBEP subcontractors.<sup>104</sup>

In 1983, the appellee construction company in *Croson* was unable to meet the set-aside requirement or secure a waiver on a city contract on which it had been the sole bidder.<sup>105</sup> After losing the contract, the company filed suit in district court alleging the plan was unconstitutional under the Fourteenth Amendment’s Equal Protection Clause.<sup>106</sup> Based on Chief Justice Burger’s opinion in *Fullilove*, which had been very deferential to

Congress and its ability to address discrimination without violating the equal protection component of the Fifth Amendment's Due Process Clause, the district court and the court of appeals found the city's MBEP plan to be constitutional.<sup>107</sup>

In 1986, the Supreme Court granted the appellee's writ of certiorari, vacated the opinion of the court of appeals, and remanded the case back to the court of appeals for further consideration in light of the Supreme Court's holding in *Wygant v. Jackson Board of Education*.<sup>108</sup> In *Wygant*, the Court held that state affirmative action programs were to be analyzed using a strict scrutiny standard of review – racial classifications had to be justified by a compelling state purpose and the means chosen by the state to effectuate that purpose had to be narrowly tailored.<sup>109</sup> On remand, the court of appeals struck down the MBEP program, finding that it violated both prongs of strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.<sup>110</sup> The City of Richmond appealed the court of appeal's decision to the Supreme Court, and the Court addressed the city's program for a second time in *Croson*.

The Supreme Court was able to deliver a majority opinion in *Croson* in which five Justices – Chief Justice Rehnquist and Justices O'Connor (who wrote the opinion), White, Stevens, and Kennedy – applied a strict scrutiny review and agreed with the court of appeals that the program failed both prongs of strict scrutiny since there was not a compelling interest for the MBEP program and the program was not narrowly tailored.<sup>111</sup> In addition, Justice Scalia wrote a concurring opinion in which he reached the same conclusion also applying strict scrutiny, but additionally arguing that all governmental racial classifications must be analyzed using strict scrutiny.<sup>112</sup> Thus, the Supreme Court

clearly held that at least for state and local government affirmative action procurement programs, strict scrutiny was the appropriate constitutional standard of review.

Justice O'Connor's opinion for the Court held that since there was insufficient evidence of past discrimination in the city's construction industry to authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause, Richmond failed to demonstrate a compelling governmental interest justifying the plan.<sup>113</sup> Justice O'Connor's elaboration on this holding with regard to minority groups other than African Americans was particularly interesting:<sup>114</sup>

There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry.

. . .

It may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

If a 30% set-aside was "narrowly tailored" to compensate black contractors for past discrimination, one may legitimately ask why they are forced to share this "remedial relief" with an Aleut citizen who moves to Richmond tomorrow? The gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation.

It seems clear that Richmond included these minority groups not because the city had evidence that all the groups had suffered from discrimination in Richmond, but rather because a business owned by members of these groups qualified as a minority business enterprise under the Public Works Employment Act, which the Supreme Court had found constitutional in *Fullilove*.<sup>115</sup> While evidence of past discrimination in an individual city

is very different from evidence of past discrimination on a national level, one still has to wonder why the Supreme Court in *Fullilove* chose to focus almost solely on the issue of past discrimination against African Americans and not address the issue of evidence of past discrimination against the other listed minority groups as the Court in *Croson* did.

J. Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act – the Disadvantaged Business Enterprises program

In 1987, Congress passed the Surface Transportation and Uniform Relocation Assistance Act (“STURAA”).<sup>116</sup> Section 106(c) of STURAA, entitled Disadvantaged Business Enterprises (“DBE”), mandated, with minor exceptions, that at least ten percent of future funds obligated under the Act as well as under the Surface Transportation Assistance Act of 1982<sup>117</sup> be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.<sup>118</sup> In 1991, the Intermodal Surface Transportation Efficiency Act (“ISTEA”) extended STURAA’s DBE program with only minor, inconsequential changes to the program.<sup>119</sup> In 1998, the Transportation Equity Act for the 21st Century (“TEA-21”)<sup>120</sup> again extended the program, again with only minor, inconsequential changes.

STURAA expressly incorporated the SDB program’s definitions and presumptions with regard to disadvantaged individuals, except it added women to the list of those presumed to be disadvantaged.<sup>121</sup> The legislative history offers no justification or explanation for the addition of women to the list of those presumed to be disadvantaged, saying only: “It is the intention of the conferees that firms owned and

controlled by women (WBEs) be included, as a presumptive group, within the definition of Disadvantaged Business Enterprise (DBE)."<sup>122</sup>

The DBE section of STURAA required the Department of Transportation (“DOT”) to promulgate regulations establishing the “minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection.”<sup>123</sup> When promulgated, these regulations stated that that the certifying authority should presume both social and economic disadvantage, and therefore eligibility to participate in the DBE program, if an applicant company was majority-owned by individuals belonging to racial groups presumed disadvantaged by the SBA or by a woman.<sup>124</sup> This presumption could not be rebutted by the government, but only by a third party that produced evidence that a particular business was not, in fact, disadvantaged.<sup>125</sup> Individuals *not* members of these minority groups would only be considered disadvantaged for purposes of the DBE program if they presented clear and convincing evidence of such status.<sup>126</sup> Thus, the DBE program implemented procedures very similar to those the section 8(d) program used.

K. *Adarand I and Adarand II*

In 1989, the Central Federal Lands Highway Division (“CFLHD”), which falls under the DOT as a division of the Federal Highway Administration (“FHA”), awarded a Colorado highway construction contract, the West Dolores Project, to a prime contractor.<sup>127</sup> In accordance with the DBE program which incorporated many of the SDB procedures,<sup>128</sup> a clause in the contract, the subcontracting compensation clause (“SCC”), stated that the prime contractor would be monetarily compensated if it awarded

subcontracts amounting to at least ten percent of the value of the prime contract to small business concerns owned and controlled by socially and economically disadvantaged individuals as certified by the SBA or any state highway agency.<sup>129</sup> The compensation amount was ten percent of the amount of each DBE subcontract, with the total compensation not to exceed two percent of the total prime contract value.<sup>130</sup>

The prime contractor then solicited bids from subcontractors for the guardrail portion of the contract, and Adarand Constructors, Inc. (“Adarand”), a non-DBE business, submitted the low bid.<sup>131</sup> Gonzales Construction Company (“Gonzales”), a company that had been certified as a DBE company in 1985 by the State of Colorado Department of Highways based on a presumption that the Hispanic American owner of the company was both socially and economically disadvantaged,<sup>132</sup> also submitted a bid.<sup>133</sup> The prime contractor awarded the subcontract to Gonzales solely because of the SCC.<sup>134</sup> Adarand filed suit in the United States District Court for the District of Colorado (“*Adarand I*”) claiming that the use of race-based presumptions violated Adarand’s right to equal protection.<sup>135</sup> The district court, based on its understanding that the holding in *Croson* did not apply to federal affirmative action procurement programs and that the applicable standard of review for such federal programs under *Fullilove* was something more deferential than strict scrutiny,<sup>136</sup> found the program constitutional, and the United States Court of Appeals for the Tenth Circuit affirmed the decision (“*Adarand II*”).<sup>137</sup> Adarand appealed these decisions to the Supreme Court, which granted certiorari.<sup>138</sup>

### III. Adarand III through Adarand VI

#### A. Adarand III – Race-conscious government procurement programs must be subjected to strict scrutiny

In 1995, the Supreme Court overturned the decision of the lower courts in *Adarand III*. Justice O'Connor wrote the majority opinion with only four Justices, Justices Stevens, Ginsburg, Souter, and Breyer, dissenting from the majority's decision.<sup>139</sup> Thus, *Adarand III* produced an opinion that clearly established strict scrutiny as the standard to be applied when a court reviews a race-conscious federal, state or local affirmative action procurement program.<sup>140</sup> The majority stated that since the equal protection components of the Fifth and Fourteenth Amendments are indistinguishable, all governmental racial classifications, whether they are used for a federal, state or local governmental program, must serve a compelling governmental interest and be narrowly tailored to further that interest.<sup>141</sup> Justice O'Connor was careful to point out that since the government may act in response to both the practice and the effects of racial discrimination against minority groups, the holding did not mean that procurement programs such as the DBE program could not pass constitutional muster under a strict scrutiny analysis.<sup>142</sup> Rather than resolving the issue of whether the program survived strict scrutiny, however, the majority remanded the case to the lower courts to decide the issue.<sup>143</sup>

Since the case was remanded, it is not surprising that the majority did not address the issue of how minority groups had been selected to be included among those presumed to be disadvantaged for purposes of the DBE program. The dissenting opinions did not address the issue either. For example, while Justice Ginsburg discussed some of the

hardships faced by Hispanic Americans, African Americans, and women in her dissent, she did not address the rationale for including the numerous other minority groups that qualified for the presumption of disadvantage under the DBE program.<sup>144</sup>

B. *Adarand IV* – On remand the district court held that the Disadvantaged Business Enterprise program is both under-inclusive and over-inclusive

On remand, the district court in *Adarand Constructors, Inc. v. Pena* (“*Adarand IV*”) held that the DBE program violated the Equal Protection Clause and was unconstitutional.<sup>145</sup> In applying strict scrutiny, the district court found that Congress had a compelling governmental interest to overcome discriminatory barriers in the federal government construction industry, but that the racial classification system implemented by the DBE program to achieve that goal was not narrowly tailored.<sup>146</sup> The court found the program to be both under-inclusive and over-inclusive:<sup>147</sup>

... I find it difficult to envisage a race-based classification that is narrowly tailored.

The statutes and regulations governing the SCC program are overinclusive in that they presume that all those in the named minority groups are economically and, in some acts and regulations, socially disadvantaged. This presumption is flawed, as is its corollary, namely that the majority (caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged. By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the SCC program is underinclusive.

Thus, the court did not address the issue of which minority groups had been selected for the presumption of being disadvantaged, focusing instead on the fact it could not envision any racial classification system that would survive strict scrutiny. In a

footnote, however, the court did address the absurdity of some of the minority groups and their members that were presumed disadvantaged, saying, “Indeed, under these standards, the Sultan of Brunei would qualify [for the DBE program].”<sup>148</sup>

After the decision in *Adarand IV*, Adarand filed suit against Colorado state officials challenging Colorado’s use of DBE guidelines in administering federally assisted highway programs.<sup>149</sup> After the suit was filed, Colorado modified its DBE regulations by replacing the presumption of social and economic disadvantage for racial and ethnic minorities with a requirement that a finding of social disadvantage could only occur if an individual certified that he or she was socially disadvantaged.<sup>150</sup> After this change, the State of Colorado certified Adarand as a DBE.<sup>151</sup>

C. *Adarand V* – Adarand’s constitutional challenge found to be moot by the court of appeals

In 1999, after Adarand had been certified as a DBE, the appeal of *Adarand IV* was decided in *Adarand Constructors, Inc. v. Slater* (“*Adarand V*”).<sup>152</sup> The court of appeals in *Adarand V* held that since Colorado had certified Adarand as a DBE, Adarand’s constitutional challenge to the DBE program was moot.<sup>153</sup> The appeal of this decision to the Supreme Court resulted in *Adarand Constructors, Inc. v. Slater* (“*Adarand VT*”).<sup>154</sup>

D. *Adarand VI* – The court of appeals’ mootness holding overturned by the Supreme Court

In *Adarand VI*, the Supreme Court reversed the decision of the court of appeals and remanded the case back to that court because dismissal on grounds of mootness is

justified only when it is absolutely clear that a litigant no longer has any need of the judicial protection that it sought, and Adarand was not in that position.<sup>155</sup> The Court pointed out that Colorado's modification of the DBE certification process was not in accordance with federal regulations.<sup>156</sup> These regulations required Colorado: (1) to presume members of the enumerated minority groups to be disadvantaged, and (2) to make individualized determinations before certifying individuals not members of those groups as being disadvantaged.<sup>157</sup> Since Colorado's new procedures did not include either requirement, the Court doubted Colorado's certification of Adarand as a DBE was valid.<sup>158</sup>

#### **IV. Adarand VII through Adarand VIII**

##### **A. Adarand VII – the Disadvantaged Business Enterprise program as revised is found constitutional by the court of appeals**

In 2000, the court of appeals on remand held in *Adarand Constructors, Inc. v. Slater* ("Adarand VII") that while the government established a compelling interest for the DBE program, the program as it existed in 1996 was not narrowly tailored and was therefore unconstitutional.<sup>159</sup> Conversely, it found the program as it was being implemented at the time of its decision in 2000 to be narrowly tailored and constitutional.<sup>160</sup>

1. Adarand is denied standing to challenge the sections 8(a) and 8(d) programs or the provisions of the Disadvantaged Business Enterprise program pertaining to women-owned businesses

In the first section of the *Adarand VII* opinion, the court of appeals stated that Adarand did not have standing to challenge the SBA's 8(a) or 8(d) program or the provisions of the DBE program pertaining to women-owned small businesses.<sup>161</sup> While the lack of standing as to the 8(a) and 8(d) programs made sense because those are unique and separate from the DBE program,<sup>162</sup> the decision to address the presumption of disadvantage for all groups except women is harder to understand.

Under the DBE program, a small business majority owned by a woman is treated the same as one majority-owned by an Aleut American – they both are able to take advantage of a presumption of disadvantage. While the *Adarand* situation did not involve a small business majority-owned by an Aleut American, the court rightfully addressed the presumption of disadvantage that such a company would enjoy under the DBE program. By the same token, the court should have addressed that same presumption as it is applied under the program to women-owned small businesses.

The court's primary justification for its decision not to grant standing was that the court had not granted standing on the issue in *Adarand II*, and the Supreme Court in *Adarand III* had not expressly overturned that aspect of its decision.<sup>163</sup> However, in the section of *Adarand III* that the court of appeals cited in support of this justification, the Supreme Court did not state that the review of the DBE program should be limited to racial classifications. Rather, the Supreme Court stated in the cited section that Adarand satisfied the standing requirement because it made an adequate showing that “sometime in the relatively near future it will bid on another Government contract that offers

financial incentives to a prime contractor for hiring disadvantaged subcontractors.”<sup>164</sup>

While the Supreme Court could have limited its holding by using the term “subcontractors disadvantaged as a result of race,” it did not. It simply used the term “disadvantaged subcontractors,” and STURAA, ISTEA and TEA-21 all expressly define women-owned subcontractors as being disadvantaged for purposes of the statutes.<sup>165</sup>

The court of appeals in *Adarand VII* also referred to its holding in *Adarand II* as justification for not reviewing the DBE program as it pertained to women-owned businesses.<sup>166</sup> However, this justification seems flimsy, as well.

In *Adarand II* the court did not grant standing on the issue of women-owned businesses even though Adarand raised the issue in its complaint, in part because Adarand did not argue the point in its motion for summary judgment at the district court in *Adarand I* and “did not press this point” during arguments at the court of appeals in *Adarand II*.<sup>167</sup> However, Adarand presumably did not directly address most of the thirty-seven nationalities or ethnicities to which the DBE program affords a presumption of disadvantage. Such a failure to contest each and every one of the listed sub-groups did not mean there was no judicial obligation to determine the constitutionality of the presumption applied to these sub-groups.

The court of appeals in *Adarand II* also based its standing decision on the fact Adarand offered no evidence that it had been denied a federal subcontract in the *past* because of a woman-owned business’s bid.<sup>168</sup> However, this finding should not have governed the court’s standing decision in *Adarand VII* because the Supreme Court held in *Adarand III* that standing for Adarand’s claim for forward-looking relief was based on the likelihood of a prime contractor selecting a disadvantaged business over Adarand in

the *near future*.<sup>169</sup> In addition, Adarand offered no evidence that it had been denied a federal subcontract that was awarded to an African American-owned business or an Aleut American-owned business, but the *Adarand* holdings apply just as much to these businesses as they do to businesses owned by Hispanic Americans like Gonzales.

Last, the court of appeals in *Adarand II* supported its decision by stating Adarand offered no evidence that the DBE program's treatment of women-owned businesses prevented Adarand from bidding on an equal basis for federal subcontracts.<sup>170</sup> This made little sense, because the DBE program expressly stated that prime contractors had to make a good faith effort to subcontract with DBEs, including women-owned small businesses, and that in turn caused a subcontracting bid from a company like Adarand to be evaluated differently than one submitted by a small woman-owned business.

Underlying the court of appeals decision not to address the presumption of disadvantage the DBE program applies to women-owned small businesses could be the fact such gender-based affirmative action programs are reviewed using intermediate scrutiny, not strict scrutiny. Justice Stevens pointed this out in his dissent in *Adarand III*, stating: “[T]he Court will apply ‘intermediate scrutiny’ to cases of invidious gender discrimination and ‘strict scrutiny’ to cases of invidious race discrimination.”<sup>171</sup> Thus, to constitutionally review the DBE presumptions of disadvantage would require subjecting the racial classifications to strict scrutiny and the gender classification to intermediate scrutiny. Despite the complexity of such a review, that is what should have occurred. It is not a stretch to hypothesize that Colorado-based Adarand is more likely “in the relatively near future” to bid on a government contract in which the prime contractor

subcontracts with a woman-owned small business, than for the same situation to occur except the prime contractor subcontracts with an Aleut American-owned small business.

## 2. Compelling interest analysis

After explaining its determination of what aspects of the case *Adarand* had standing to contest, the court of appeals in *Adarand VII* began its strict scrutiny review by determining whether the DBE program serves a compelling governmental interest.<sup>172</sup> To make this finding, the court used a four-part analysis: (1) whether the articulated goal of the DBE program's race-conscious measures is a compelling interest; (2) what standards to apply in order to evaluate the government's compelling interest evidence; (3) whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and (4) whether *Adarand*'s rebuttal of the government's evidence warrants summary judgment being granted to either party.<sup>173</sup>

### a. Minority firms exclusion from “old boy” networks

After introducing the four-part test, the court began its compelling governmental interests analysis by finding that there was strong evidence to support Congress' finding that discrimination exists in the subcontracting industry and there was a governmental need to address those effects.<sup>174</sup> The court found two kinds of discriminatory barriers to minority subcontracting that showed “a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the

channeling of those funds due to private discrimination.”<sup>175</sup> The first discriminatory barrier it found was the lack of competition for public construction contracts by minority enterprises because of the many impediments minorities face when forming businesses due to private discrimination.<sup>176</sup> The second discriminatory barrier was the inability of existing minority firms to fairly compete for public construction subcontracting contracts because of private discrimination.<sup>177</sup>

In support of its finding of the existence of these barriers, the court stated that the evidence demonstrated “that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide.”<sup>178</sup> After it cited as evidence numerous congressional reports and testimony, the court concluded that minority firms traditionally have been excluded from “old boy” networks, which rely on a familial history of participation in the subcontracting market.<sup>179</sup>

The court and the evidence it cited did not explain, however, why certain minority groups apparently were excluded from the “old boy” networks while others apparently were not. For example, the opinion did not address why the court believed an Indian American-owned small business was excluded from the “old boy” networks such that a presumption of disadvantage was justified, while an Iranian American-owned small business, which one could assume was excluded from the “old boy” networks by roughly the same measure, was not afforded the same presumption.

Another troubling aspect of the court’s discriminatory barrier analysis was the fact that the court, as well as the evidence it cited, frequently used the generic term “minorities” instead of an identifiable minority group.<sup>180</sup> While the use of the term

“minorities” can be convenient, many individuals that are generally considered to be “minorities” – such as Hasidic Jews or individuals of Middle Eastern descent – did not benefit from the program. Accordingly, a study of discriminatory treatment experienced by “minorities” gave the court little insight into whether the government had a compelling interest to promote government contracting among those groups presumed to be disadvantaged under the DBE program.

When the court did cite evidence concerning specific minority groups to support its finding on the barriers, in every instance it cited evidence of discrimination against African Americans, Hispanic Americans, or women, with the following two exceptions: (1) a study partly addressing discrimination Pacific-Islander-owned firms in the Atlanta area faced when getting bonding; and (2) testimony concerning banks in North Dakota that refused to lend money to nearby Native American communities.<sup>181</sup> Further, the only time the court directly quoted evidence in support of its finding that minority businesses seeking to enter construction subcontracting face barriers, the quoted passage concerned comparisons among Anglo Americans, Hispanic Americans and African Americans:<sup>182</sup>

[The study] surveyed 407 business owners in the Denver area. It found that African Americans were 3 times more likely to be rejected for business loans than whites. The denial rate for Hispanic owners was 1.5 times as high as white owners. Disparities in the denial rate remained significant even after controlling for other factors that may affect the lending rate, such as the size and net worth of the business. The study concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample (Black, Hispanic and Anglo) were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.”

Thus, for the most part, the court did not address what evidence Congress considered to justify a program that granted preferential treatment to Americans of thirty-seven

nationalities or ethnicities. Instead, the court focused on evidence that supported giving African Americans, Hispanic Americans, and women preferential treatment.

It also was puzzling that the court, after holding Adarand did not have standing to challenge the DBE program as it is applied to women-owned businesses, cited numerous reports and testimony addressing discrimination faced by women.<sup>183</sup> In light of the court's determination that it would not analyze that aspect of the DBE program, the evidence had no relevance to the case, should not have been considered, and certainly should not have been used to support the court's decision.

b. Minority business participation level

Beyond the two discriminatory barriers, the court cited two other factors in support of its conclusion that the government met its initial burden of presenting a compelling interest. The first additional factor was the court's finding that the evidence raised an inference that "various discriminatory factors" against "minority" companies had led to such companies having a thirteen percent lower market utilization than they should.<sup>184</sup> The second additional factor was the "ample evidence that when race-conscious public contracting programs [were] struck down or discontinued, minority business participation in the relevant market drop[ped] sharply or even disappear[ed]."<sup>185</sup> The opinion provided no indication that the evidence that led the court to make these findings came from studies of those minority groups presumed disadvantaged by the DBE program or that the market utilization rates were broken down to determine the rates for each of the program's minority groups. Instead, the court, and the evidence it cited,

simply used the generic term “minority” when describing the owners of the businesses that were studied.

c. Adarand's rebuttal of the government's evidence

After finding that the government had met its initial burden of demonstrating a compelling interest, the court concluded in no uncertain terms that Adarand “utterly failed” to rebut the existence of that interest.<sup>186</sup> The court noted: “[The court] rejects Adarand's characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous ‘disparity studies.’”<sup>187</sup> The court's sweeping rejection of Adarand's evidence, however, was not accompanied by a detailed explanation of the particular aspects of the rebuttal it found insufficient. Nevertheless, the court, in a footnote, did respond to Adarand's contention that the evidence was too broad in scope and did not address all minority groups presumed to be disadvantaged:<sup>188</sup>

We likewise reject Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. If Congress has valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. “Race” is often a classification of dubious validity -- scientifically, legally, and morally. We need not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” 15 U.S.C. § 637(d)(3)(C).

The court's comments in the footnote did not explain why the court failed to cite any studies of discrimination against Asian Americans in its decision or why some Americans of Asian heritage were not considered Asian Americans for purposes of the DBE program. For example, an American whose cultural heritage relates back to the Asian portions of the former Soviet Union is properly called an Asian American for most purposes, but he or she has never been presumed disadvantaged for purposes of the DBE program. It also is difficult to imagine how a court could take notice of something as broad as "the harsh fact" that "other minorities" experience racial discrimination. Use of such an open-ended, imprecise classification seems incompatible with the ability to find a compelling interest.

### 3. Narrowly tailored analysis

Having found a compelling governmental interest, the court of appeals next analyzed the facts to determine whether the DBE program was narrowly tailored. This analysis consisted of three factors that *Adarand III* specifically required: (1) the availability of race-neutral alternative remedies; (2) an appropriate limit on the program to ensure it did not last longer than the discriminatory effects it was designed to eliminate; and (3) a determination of whether the program was over-inclusive or under-inclusive (this is the last factor the court considered when making its decision).<sup>189</sup> The analysis also consisted of three other factors: (1) the flexibility of the program; (2) the numerical proportionality of the program; and (3) the program's burden on third parties.<sup>190</sup>

a. Race-neutral alternatives analysis

In the court's opinion, the DBE program as it was being implemented in 2000 satisfied the race-neutral remedy portion of the analysis because Congress considered race-neutral measures before resorting to a revised DBE program.<sup>191</sup> The court did not make the same finding with regard to prior incarnations of the program, finding that the government had not considered other measures that were more narrowly tailored before promulgating earlier DBE regulations.<sup>192</sup> According to the court, the deficiencies of the earlier regulations had been corrected by revisions that occurred after passage of TEA-21, and these revisions allowed the DBE program to pass constitutional muster with regard to the consideration of race-neutral alternative remedies.<sup>193</sup>

The court cited the following changes to 49 C.F.R. § 26.51 to support its finding that the situation had "changed dramatically" since TEA-21 had been enacted: (1) a recipient of DOT financial assistance was required to meet the maximum feasible portion of its overall DBE participation goal through race-neutral means such as helping DBEs overcome bonding and financing obstacles, providing DBEs technical assistance, and establishing programs to assist start-up firms; and (2) a state that could meet its overall goal through race-neutral means had to do so.<sup>194</sup>

The court held that while the DBE program was not narrowly tailored prior to 1996 because race-neutral measures like the ones it cited had not been implemented, the above revisions to 49 C.F.R. § 26.51 "that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized" corrected that constitutional transgression.<sup>195</sup>

b. Program duration analysis

The court next considered the duration of the DBE program's race-conscious measures. The court made the following findings to support its holding that the program as it was being applied in 2000 was appropriately limited such that it would not last longer than the discriminatory effects it was designed to eliminate: (1) a company certified as a DBE using 8(a) criteria was not permitted to maintain DBE status for more than approximately ten and one-half years and could "graduate" from the program earlier than the limit if its required annual financial status submission showed the company had exceeded certain financial measures; (2) a company certified as a DBE using 8(d) criteria was required to be recertified every three years (although it did not have a maximum period of DBE program eligibility); (3) Congress "extensively debated whether to renew the DBE program prior to passing TEA-21"; and (4) the DBE program was limited to the duration of TEA-21 and other similar highway appropriations statutes.<sup>196</sup> As it held on its race-neutral measures analysis, the court found that the program was unconstitutional in 1996 because it did not have time limit and graduation provisions, but that the revised program passed constitutional muster.<sup>197</sup>

The court's key findings – that Congress extensively debated the DBE program before it extended the program, appropriations statutes were not of an unlimited duration, and that tri-annual DBE certifications must reoccur in accordance with 8(d) criteria – were not overwhelming evidence that the DBE program had been constitutionally limited in its duration. More importantly, the court did not even consider a factor that seemed to be critical in any durational analysis of the DBE program – the lack of any required

periodic reexamination of the minority groups presumed to be disadvantaged to determine whether any of the groups had “graduated” from the program and no longer needed the presumption. Having such a process in place would seem to be essential to any constitutional review of the program.

The program’s purpose is to help certain listed minority groups gain an equal footing with those who have benefited from the “old boy” networks, yet it provides for no determination as to when or whether its purpose is achieved. To correct this problem, the government must review each minority group to determine if it is still being excluded from subcontracts for discriminatory reasons or if it has been able to receive enough business such that a presumption of disadvantage is no longer necessary. Without such a review, it does not seem possible that the program can meet *Adarand III*’s requirement that it be “appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate.”<sup>198</sup>

c. Inclusiveness analysis

The last factor specifically required by *Adarand III* that the court considered was over-inclusiveness and under-inclusiveness. The court analysis of this factor was its most extensive. As it did on the previous factors, it conducted an analysis of the program as it existed in 1996 and an analysis of the program as it was being implemented in 2000. Again, the court’s analysis of this factor resulted in a finding that the program did not meet the constitutional requirement in its earlier forms, but that its 2000 version satisfied the requirement.

The court spent little of its extensive inclusiveness analysis addressing the most obvious components of such an analysis – whether a significant number of non-disadvantaged businesses are treated as being disadvantaged under the DBE program, and whether the DBE program excludes a significant number of truly disadvantaged businesses by not affording them a presumption of disadvantage. As the court in *Adarand IV* described the first issue in its inclusiveness analysis, a company owned by the Sultan of Brunei conceivably could be presumed disadvantaged under the DBE program.<sup>199</sup> Conversely, the presumption of disadvantage enjoyed by a small business owner of Brunei descent does not apply to a small business owned by an Afghani American who left Afghanistan penniless after the Soviet invasion or during the period of Taliban rule and who has been subjected to discriminatory treatment as a result of his or her Islamic beliefs. While it is true that the company owned by the Afghani American could nonetheless apply for certification as a DBE, the fact it is not afforded the presumption of disadvantage that companies owned by members of the enumerated minority groups receive should have been addressed by the court.

The court dismissed Adarand's arguments based on these problems with the DBE program in a fairly concise fashion. In the court's opinion, the DBE regulations had been changed such that the Sultan of Brunei could not have been certified as a DBE because his net worth exceeded the program's maximum amount.<sup>200</sup>

The regulations do not govern, however, statutory law does, and the statutes are clear that if Sultan of Brunei became an American citizen he would be presumed to be socially and economically disadvantaged for purposes of the DBE program. TEA-21 states that, except for women (whom the Act expressly presumes are socially and

economically disadvantaged), the definition of “socially and economically disadvantaged individuals” for purposes of the DBE program is found at section 8(d) of the Small Business Act as codified at 15 U.S.C. 637(d).<sup>201</sup> That section in turn states that a contractor “shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C.A. 637(a)].”<sup>202</sup> Therefore, if an individual from Brunei becomes an American citizen, including the Sultan of Brunei, the individual, as an Asian Pacific American, should be presumed socially and economically disadvantaged.

In addition to its comments concerning the Sultan of Brunei’s eligibility for the DBE program, the court also stated that since racial and ethnic categories are unreliable and discrimination commonly occurred based on much broader racial classifications, the issues of whether groups such as Samoan Americans or Bhutanese Americans have experienced discrimination was “more a question of nomenclature than of narrow tailoring.”<sup>203</sup>

The DBE program’s use of this nomenclature is critical to a narrow tailoring analysis, however, because most likely many groups that are presumed disadvantaged are no more disadvantaged than other groups that are not so presumed. For example, the government developed a nomenclature that presumes a Pakistani American is disadvantaged, but which does not presume that disadvantage for an Afghani American who comes from a village a few miles from the Pakistani border. Because the government’s system for determining whether a business is entitled to a presumption of

disadvantage is based on nomenclature, nomenclature must be analyzed for over-inclusiveness and under-inclusiveness.

Instead of focusing on whether the overall program included or excluded individuals that it should not have, the court based its inclusiveness analysis on whether the government considered the effectiveness of a “less sweeping approach to implementing a race-conscious SCC program.”<sup>204</sup> Using this approach to analyze inclusiveness, the court found that the DBE program’s use of the 8(a) program’s presumption of social disadvantage (but not economic disadvantage) for members of the enumerated minority groups met the constitutional inclusiveness standard, but that the DBE program’s alternative use of the 8(d) program’s presumption of both social and economic disadvantage did not.<sup>205</sup> It predicated this finding on its belief that since the 8(a) program worked and was more narrowly tailored than the 8(d) program, it established the constitutional standard for inclusiveness.<sup>206</sup>

The court’s inclusiveness analysis, instead of being a determination of whether the DBE program is over- or under-inclusive, was another race neutral alternative remedies analysis. In the court’s view, a DBE program inclusiveness analysis should focus on whether there is a workable program more race-neutral than the 8(d) program. Because of this belief, the court did not scrutinize aspects of the DBE program critical to an inclusiveness analysis, such as an examination of the groups the program included and excluded. Instead, the court chose to focus on a comparison of the 8(a) and 8(d) programs.

Overall, the result of the court’s inclusiveness analysis was that the court again found that the DBE program was unconstitutional as it was being implemented in 1996,

but that regulatory changes implemented since that time had corrected the program's constitutional inclusiveness deficiencies.<sup>207</sup> According to the court, these regulatory changes – which, as discussed above, were not accompanied by statutory changes – eliminated the 8(d) program's presumption of economic (but not social) disadvantage for members of the listed minority groups.<sup>208</sup> The court found that after the regulatory changes, both the 8(a) and 8(d) programs presumed that members of the listed minority groups were socially disadvantaged, but that members of such groups were required to make an individualized showing that they were economically disadvantaged to be enrolled in the DBE program.<sup>209</sup> The court concluded: "With the individualized determination of § 8(a) extended to economic disadvantage under § 8(d), the main obstacle to a finding of narrow tailoring has disappeared."<sup>210</sup> However, even assuming the regulations governed over a statute that presumed that individuals from the enumerated minority groups were socially and economically disadvantaged, the court's conclusion did not answer the important inclusiveness question of why members of some minority groups were presumed socially disadvantaged and members of other minority groups were not.

d. Flexibility analysis

Of the three factors not mentioned in *Adarand III* to determine whether the DBE program was narrowly tailored, the court first addressed flexibility. In effect, the flexibility analysis performed by the court was an analysis of whether prime contractors were required by law or regulation to use DBEs. The court came to the quick conclusion that since prime contractors did not have to take compensation under the compensation

clause and were not required to make a gratuitous choice of subcontractors, the DBE program “passe[d] muster under a narrow-tailoring analysis.”<sup>211</sup>

The court’s flexibility analysis, however, failed to consider the fact that there are times when a prime contractor must award a subcontract to a DBE submitting a higher bid than a non-DBE.<sup>212</sup> Under the DBE program, states are required to establish a DBE participation goal on DOT-assisted contracts, and prime contractors bidding on such contracts must make “good faith” efforts to meet the goal.<sup>213</sup> These required “good faith” efforts include a requirement that a prime contractor subcontract with a DBE even if the DBE’s bid is higher than a non-DBE’s bid, so long as the difference between the bids is not unreasonable.<sup>214</sup> According to the DBE regulations, unless “the price difference is excessive or unreasonable,” the fact the DBE’s bid is more costly “is not in itself sufficient reason for a bidder’s failure to meet the contract DBE goal.”<sup>215</sup> Thus, if a prime contractor solicits for subcontract bids and receives a DBE bid that is not excessively higher than other bids, the company must contract with the DBE or risk not being awarded the prime contract due to a failure to engage in good faith efforts to meet the contract’s DBE participation goal.

Accordingly, while the DBE regulations do not specifically mandate that subcontracts be awarded to DBEs, the fact the program under certain circumstances requires a prime contractor to award a subcontract to a DBE that has submitted a higher bid than other subcontractors has the practical effect of, at times, forcing a prime contractor to make an unwarranted award of a subcontract to a DBE. This undercuts the court’s finding that there was no law or regulation that required a prime contractor to use

a DBE, and it renders the DBE program much less flexible than the court made it appear in its opinion.

e. Numerical proportionality analysis

The court next considered numerical proportionality. It analyzed the constitutionality of the program's numerical proportionality by examining how reasonable its minority participation goals were. The court concluded that there was homogenous ownership within the industry resulting from past discrimination and that the program's goals were narrowly tailored to remedy that fact.<sup>216</sup> To justify this determination, the court found that the program's goals were "aspirational" and not mandatory, which would have rendered them unconstitutional.<sup>217</sup> Because of the goals "aspirational" nature, the court stated that Adarand was unable to establish that it "lost or will lose contracts due to the STURAA/ISTEA/TEA-21 10% goals for DBE participation" and that Adarand was "without standing to mount any independent challenge" to the goals.<sup>218</sup>

The court's conclusion that the program's goals were "aspirational" and not mandatory, however, does not withstand closer scrutiny because, as discussed above, there are times when a prime contractor must award a subcontract to a DBE submitting a higher bid than a non-DBE. It is disingenuous to characterize participation goals as being nothing more than "aspirational" when, under certain circumstances, prime contractors are given no choice but to award subcontracts to DBEs.<sup>219</sup>

After finding that the program's goals were "aspirational," the court's proportionality analysis next addressed agency participation goals. In this part of its

analysis, the court found that a prior participation goal set by the FHA of twelve to fifteen percent was unconstitutional because the goal's percentage range was not supported by any explanation, but that the problem had been corrected by revisions to the program's regulations that required a "much more rigorous" process be followed before agency participation goals were set.<sup>220</sup> The court also found significant the revised regulations statement that a prime contractor that did not meet a contract's participation goal should not be penalized or held in noncompliance if it had made "good faith" efforts toward achieving the goal.<sup>221</sup> When addressing the issue of "good faith" efforts, however, the court did not discuss the fact that these required efforts at times include a requirement that a prime contractor subcontract with a DBE even if the DBE's bid is higher than a non-DBE's bid.<sup>222</sup>

f. Burden on third parties analysis

In examining the burden the DBE program placed on third parties – the last of the narrowly tailored factors not mentioned in *Adarand III* – the court determined that while "some non-DBE subcontractors such as Adarand [were] deprived of business opportunities," the problem was not severe enough such that the program was not narrowly tailored.<sup>223</sup> Explaining this finding, the court stated, "While at the margin, some DBEs may be hired under the program in lieu of non-DBEs, the possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored."<sup>224</sup>

The court listed the following in support of its holding that the program's impact on third parties was minimal: (1) the government's brief – no regulation was cited –

claimed that the revised program limited compensation to \$50,000-\$100,000 and thus “after a fairly low threshold, the incentive for the prime contractor to hire further DBEs disappears;” (2) compensation above two percent of the total contract is prohibited; (3) the regulations had reduced the required standard of proof from clear and convincing evidence to a preponderance of the evidence for companies not presumed to be socially disadvantaged to establish that they suffer from such status; and (4) the regulations stated that DBE compensation was permissible only when the system ensured that DBEs did not unduly burden non-DBEs’ opportunities by dominating a certain type of work.<sup>225</sup>

Missing from the court’s analysis is the third party impact resulting from some businesses being presumed disadvantaged while other businesses owned by individuals that suffer from the same or similar disadvantages not being given the same presumption. Third parties are not just male, Caucasian-owned businesses that lose contracts due to the DBE program. They are also minority-owned businesses denied a presumption of disadvantage, despite the fact they are situated equally or worse than those that enjoy the presumption, because they happen not to have a heritage from a listed country.

4. *Adarand VII did not address all relevant issues and left many questions unanswered*

Overall, while the court of appeals in *Adarand VII* very thoroughly analyzed some aspects of the DBE program, the court: insufficiently scrutinized how minority groups were selected for the presumption of disadvantage, did not address whether the government scheduled periodic assessments of the economic and social status of these groups, and did not question why some groups that were equally or more disadvantaged

than the listed groups were not selected for the presumption. At the very least, these issues would seem to form the crux of an inclusiveness analysis.

In addition, the relevance of some of the evidence cited by the court to support its findings is not easily discernible. For example, the court cited testimony and reports addressing discrimination faced by women to support of some of its findings. Given its decision that Adarand did not have standing to challenge the portions of the DBE program that pertain to women-owned businesses, this evidence has no relevance and should not have been considered by the court. Given these problems and others described above, *Adarand VII* left many questions unanswered.

B. *Adarand VIII* – the Supreme Court granted and then dismissed Adarand’s petition for certiorari

In 2001, the Supreme Court granted Adarand’s petition for certiorari to resolve the following two issues: (1) whether the court of appeals misapplied the strict scrutiny standard when it determined that Congress had a compelling interest to enact the DBE program; and (2) whether the DBE program as it existed in 2001 was narrowly tailored to serve a compelling governmental interest.<sup>226</sup> The Supreme Court did not answer these questions and did not render an opinion on whether the DBE program violated the constitutional guaranty of equal protection, however, because in its brief and oral arguments Adarand claimed it was not challenging the program as implemented by TEA-21.<sup>227</sup> By doing so, Adarand removed from contention the issues that the Supreme Court had granted certiorari to resolve.

According to the Supreme Court in a per curiam opinion, Adarand expressly accepted without challenge the procurement process used by states and localities under TEA-21 and regulations implementing the Act.<sup>228</sup> Instead, the Supreme Court found that Adarand was challenging only the statutes and regulations that pertain to the DOT's direct procurement of highway construction on federal lands.<sup>229</sup> The Supreme Court pointed out that such procurement is not governed by TEA-21 or its regulations, but by the Small Business Act, including the 8(d) program.<sup>230</sup> The Court then explained that because of the position taken by Adarand, it was dismissing as improvidently granted the writ of certiorari that it previously had granted.<sup>231</sup> The Supreme Court based this decision on the following:: (1) the court of appeals had not considered whether the various race-based programs applicable to direct federal contracting could satisfy strict scrutiny; and (2) the court of appeals held that Adarand lacked standing to challenge any program other than the DBE program and Adarand did not challenge that holding in its petition for certiorari.<sup>232</sup>

The Supreme Court appeared to be anxious to review the court of appeals decision in *Adarand VII*, but unfortunately Adarand's decision not to contest *Adarand VII*'s holding that the DBE program was constitutional ended the possibility of such a review. Given the fact the 8(d) program still expressly presumed social and economic disadvantage, and the DBE program arguably only presumed social disadvantage, Adarand's position was understandable. However, as discussed above, TEA-21 stated that for purposes of the Act, the 8(d) program's definition of social and economic disadvantage should be applied, which included the presumption of social and economic disadvantage for members of the listed minority groups.<sup>233</sup> Thus, it appears Adarand

could have limited its appeal to the constitutionality of the DBE program and still addressed the issue of the presumption of social and economic disadvantage. Even if the Supreme Court addressed the DBE program through its regulations and only the presumption of social disadvantage, as occurred in *Adarand VII*, the issue of which minority groups were and were not presumed socially disadvantaged and how the groups were chosen almost certainly would have been addressed by the Court. Unfortunately, we are left with no opinion on the matter from the nation's highest court.

V. **Sherbrooke Turf – By simply adopting *Adarand VII*'s findings and conclusions, the court abandoned its judicial role and failed to subject the Disadvantaged Business Enterprise program to strict scrutiny**

A. **The compelling interest test is replaced with a “strong evidence” test**

There has been one other recent case in which a plaintiff contractor was granted standing to challenge the DBE program,<sup>234</sup> *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation* (“*Sherbrooke Turf*”).<sup>235</sup> In this case, Sherbrooke Turf, Inc. (“Sherbrooke”), a Minnesota corporation owned and operated by Caucasian males which provides landscaping services for land adjacent to highways, submitted bids on two federally assisted highway projects in which it alleged its bids were lower or superior than the bids of the DBEs that were awarded the contracts.<sup>236</sup> Sherbrooke filed suit in the United States District Court for the District of Minnesota alleging the DBE provisions of TEA-21 and the program’s implementing regulations are unconstitutional, violated its civil rights under federal law and the Minnesota Constitution, and that its “Caucasian-

male ownership, which denied it DBE status, unlawfully encumbered its right to be selected for the [contracts].”<sup>237</sup>

The court granted the government’s motion for summary judgment, finding that the program withstands strict scrutiny.<sup>238</sup> Interestingly, the *Sherbrooke Turf* court analyzed the program both in terms of its racial and national origin preference, and, unlike *Adarand VII*, which had been issued a year earlier, its gender-based preference.<sup>239</sup> The *Sherbrooke Turf* court, recognizing that gender-based preferences are subject to intermediate scrutiny, held that since it found that the DBE program survives strict scrutiny and intermediate scrutiny is a less stringent test, the program is constitutional both as it is applied to racial minority groups and to women.<sup>240</sup>

Much of the court’s “strict scrutiny” analysis was little more than a recitation of some of the findings made by the Court of Appeals for the Tenth Circuit – a court that does not set binding precedent for a Minnesota district court – in *Adarand VII*. For example, the court began its analysis with a finding that the government has a compelling interest in addressing discrimination in the disbursement of federal funds by favoring certain minority groups that it found to be disadvantaged based exclusively on *Adarand VII*’s “painstaking[ ] review[ ]” of “the congressional findings related to the passage of TEA-21.”<sup>241</sup> The court followed this statement by citing findings made by the *Adarand VII* court, making no findings of its own and citing no individual study, report or testimony.<sup>242</sup>

In response to Sherbrooke’s assertion that the *Adarand VII* court was not sufficiently rigorous to be considered strict scrutiny, the court stated that it “has no reason to suspect or doubt either the [*Adarand VII* court’s] or Congress’s ability to ascertain and

understand evidence related to the need for affirmative action in federal highway construction programs.”<sup>243</sup> The court went on to reject Sherbrooke’s seemingly sound request that it “determine for itself whether the evidence presented a compelling interest” because, according to the court, that “would impermissibly trench upon the legislative duties reserved to Congress in Article I of the United States Constitution.” Instead, the *Sherbrooke Turf* court believed its role is to “look at the record produced by Congress to determine if Congress enacted TEA-21 *on the basis of strong evidence.*”<sup>244</sup>

The court’s holding that it did not have to determine for itself whether the evidence that Congress considered before enacting TEA-21 presented a compelling interest and that it only had to ensure that the DBE program was enacted based on “strong evidence” is stunning. The court offered no legal basis and cited no cases in support of this reworking of the strict scrutiny analysis mandated by the Supreme Court in *Adarand III*. The Supreme Court in *Adarand III* specifically required courts to determine if racial classifications serve a compelling governmental interest.<sup>245</sup> If they do not, they are unconstitutional. The Supreme Court did not state that a court could rely on the findings of another court in making this determination, that making such a determination would impinge on the prerogatives of Congress under the Constitution, or that a finding that Congress acted on “strong evidence” when it enacted affirmative action legislation would be sufficient for the act to pass constitutional muster. By accepting fully the *Adarand VII* court’s findings and failing to determine for itself whether Congress had evidence of a compelling interest before it enacted the DBE program, the *Sherbrooke Turf* court completely denied the plaintiff the ability to contest the constitutionality of the program.

When reviewing a race-conscious program, the Supreme Court precedents show that a court should determine for itself if the evidence that Congress considered before enacting the program supports a finding that the government has a compelling interest. A failure to do so perpetuates the notion that all a minority group must do to reap the benefits of a federal affirmative action procurement program is be included among those presumed disadvantaged, since there will never be a subsequent review of the group's status by Congress, the federal government or the court system to determine if the presumption is still warranted. If the judiciary fails to strictly scrutinize the minority group participants in such programs, a listed minority group can expect to enjoy the benefits of the presumption of disadvantage ad infinitum without being concerned that an increase in its social and economic standing will result in it "graduating" from the program.

B. Narrowly tailored analysis

After deciding that there was a compelling governmental interest, the court in *Sherbrooke Turf* next turned to the issue of whether the program is narrowly tailored. The court's "narrowly tailored" focused on whether: (1) the government considered race-neutral alternatives to the DBE program; (2) the program was limited such that it will not last longer than the discriminatory effects it is designed to eliminate; (3) the program placed an unconstitutional burden on non-DBE companies; (4) the program was unconstitutionally inflexible; and (5) the program included minority groups without connecting the groups to a specific history of discrimination.<sup>246</sup> While the court's analysis of whether the program was narrowly tailored is insufficient, unlike its

compelling interest analysis, it did consist of more than just a recitation of the findings made in *Adarand VII*.

### 1. Race-neutral alternatives analysis

The court began its “narrowly tailored” analysis by finding that Congress “clearly considered” race-neutral alternatives.<sup>247</sup> The court came to this conclusion based solely on a House of Representatives’ Committee on Transportation and Infrastructure report.<sup>248</sup> The first problem with the court’s decision to use this report alone to determine that Congress clearly considered race-neutral alternatives is that it is a House of Representatives’ committee report, and it gives no insight into what analysis, if any, was conducted by the Senate before the DBE program was enacted. More importantly, the portion of the report cited by the court is in a section entitled “Separate Views,” which is part of a response (signed by only twenty-seven members of the House of Representatives) to a critique of the DBE program authored by seven different members of the House of Representatives. Therefore, rather than being a consideration of race-neutral alternatives by Congress, the cited section is merely a written declaration of support for the DBE program by a small fraction of the members of one body of Congress. Further, the only comment made by the twenty-seven members of the House of Representatives concerning race-neutral alternatives was the following: “Finally, the proposed rules place heavy emphasis on achieving as much of the goal as possible through race-neutral measures, such as outreach, technical assistance, and lending and bonding programs.” This did not constitute congressional consideration of race-neutral alternatives to the DBE program.

Other than its finding that Congress clearly considered race-neutral means, the court, as had the court in *Adarand VII*, found changes to 49 C.F.R. § 26.51 requiring recipients of DOT financial assistance to meet the maximum feasible portion of their overall participation goal through race-neutral means showed that the government has “a heightened commitment to incorporating race-neutral elements in the DBE program.”<sup>249</sup> This finding, in combination with the court’s finding that “Congress specifically considered” race-neutral alternatives, led the court to conclude that the DBE program passed constitutional muster with regard to the issue of race-neutral alternatives.<sup>250</sup>

## 2. Program duration analysis

The court next addressed whether the DBE program was designed to ensure it would not last longer than the discriminatory effects it hopes to eliminate. The court’s analysis on the matter consisted of repeating findings made in *Adarand VII* before coming to the same conclusion as that court – “[the program’s] duration-limiting provisions support its constitutionality.”<sup>251</sup> As was the case in *Adarand VII*, the *Sherbrooke Turf* court did not state whether the government had mechanisms: (1) to determine when a particular minority group no longer suffers from the effects of discrimination such that inclusion in the program is not warranted; and (2) how such a group is removed from the list of those presumed disadvantaged. While it makes no sense to assert that all the minority groups covered by the DBE program will benefit from the program in such a way that they all will no longer require the program’s presumption at the same time in the future, both the *Sherbrooke Turf* and *Adarand VII* opinions appear to be based on that assumption.

### 3. Burden on third parties analysis

When looking at whether the DBE program places an unconstitutional burden on non-DBE businesses, the court concluded that although the “DBE program can place a *significant* burden on non-DBE companies,” the program’s “narrow tailoring and time limitations” respond to the problem.<sup>252</sup> Thus, in this prong of the court’s narrow tailoring analysis, the court made the absurd finding that since the program is narrowly tailored the burden on other companies is sufficiently narrowly tailored. Such circular analysis is an abdication of the court’s role in ensuring the program withstands strict scrutiny.

In addition to the above analysis, the court, again citing *Adarand VII*, briefly discussed the fact businesses not owned or operated by members of minority groups presumed disadvantaged can still apply and be certified as a DBE.<sup>253</sup> Finally, the court cited the regulatory requirement that states monitor the number and type of DBEs to prevent over-concentration to support its finding that third parties are not overburdened by the DBE program.<sup>254</sup> It concluded its burden analysis by stating that the government has “sufficiently linked the DBE program to evidence of discrimination and reduced the shared burden to a constitutionally permissible level.”<sup>255</sup>

### 4. Flexibility analysis

The court next determined that the DBE program is not unconstitutionally inflexible because the program’s goals are “aspirational,” its implementing regulations prohibit quotas, and the program does not penalize a state that tries to meet its DBE

participation goal.<sup>256</sup> As was the case in *Adarand VII*, this analysis ignores the fact there are situations in which a prime contractor must award a subcontract to a DBE submitting a higher bid than a non-DBE.<sup>257</sup> Accordingly, while the revised regulations state that the DBE program prohibits the use of quotas, it causes prime contractors to award subcontracts to DBEs when they otherwise would not. Thus, often the end result under the DBE program is the same as that under a quota system – prime contractors must subcontract with less efficient DBEs or face losing the prime contract.

5. Relationship between program benefits and a specific history of discrimination

In the last prong of its narrowly tailored analysis, the court looked at whether the DBE program affords “benefits to minority groups without connecting these benefits to a specific history of discrimination.”<sup>258</sup> Rather than taking the logical next step in the analysis – closely scrutinizing evidence of discrimination experienced by each minority group to determine if a presumption of disadvantage is warranted – the *Sherbrooke Turf* court took the *Adarand VII* approach and dismissed the issue by simply stating, “The Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications . . .”<sup>259</sup> This approach made no attempt to resolve the issue the court itself cites as being the focus of this part of its “narrowly tailored” analysis – a determination of whether there was sufficient evidence of discrimination against each of the program’s minority group participants such that use of a presumption of disadvantage could withstand strict scrutiny.

C. The court failed to apply the strictest of judicial scrutiny as required by *Adarand III*

In *Sherbrooke Turf*, the court granted the government's motion for summary judgment after citing only two pieces of evidence in support of its decision: (1) a survey of information complied by the Department of Justice ("DOJ") entitled "The Compelling Interest for Affirmative Action: A Preliminary Survey," which was published in 1996 in response to *Adarand III* and which was appended to a public notice of procurement affirmative action reforms proposed by the DOJ;<sup>260</sup> and (2) the House of Representatives' Committee on Transportation and Infrastructure report discussed above. The court did not cite any findings made by Congress; instead the court only quoted the DOJ's conclusion that racial discrimination continues to impair minority-owned businesses.<sup>261</sup> This conclusion: (1) merely stated the opinion of a non-congressional, executive agency written over five years prior to the holding in *Sherbrooke Turf*; (2) was based, for the most part, on studies published a decade or more before the decision; and (3) did not list to which minority groups it pertains – illogically implying that it applies to all of the program's minority groups equally and to no other minority groups.

The district court in *Sherbrooke Turf* did not subject the DBE program to the "strictest of judicial scrutiny,"<sup>262</sup> nor did the court engage in "a most searching examination,"<sup>263</sup> both of which are mandated by *Adarand III*. Its review of the program was superficial, and for the most part its opinion just repeated the findings made in *Adarand VII*. As was the case in *Adarand VII*, *Sherbrooke Turf* leaves unevaluated the government's determination of which nationalities and ethnicities are presumed disadvantaged and which are not.

**VI. The section 1207 program – the Department of Defense’s program to assist small businesses owned and controlled by socially and economically disadvantaged individuals**

**A. The section 1207 program is very similar to the Disadvantaged Business Enterprise program**

Section 1207 of the National Defense Authorization Act of 1987 (“section 1207 program”) established a goal for the Department of Defense (“DOD”) that five percent of essentially all obligations incurred by the DOD for fiscal years 1987-1989 go to small business concerns owned and controlled by socially and economically disadvantaged individuals, also known as SDBs.<sup>264</sup> In order to achieve the five percent goal, the DOD was authorized to use a “price-evaluation” adjustment of up to ten percent. This permitted the department to enter into contracts using less than full and open competitive procedures so long as the price paid did not exceed the “open” market cost by more than ten percent.<sup>265</sup> The DOD incorporated the price-evaluation adjustment into its regulations by authorizing that bids received from non-SDB bidders be raised as much as ten percent above fair market price per contract.<sup>266</sup>

As a result of congressional action in 1989, 1992 and 1999, the section 1207 program was extended through the end of fiscal year 2003.<sup>267</sup> For fiscal years 1998-2003, Congress amended the program such that the DOD was required to suspend the use of price-evaluation adjustments for one year after any fiscal year in which the department awarded more than five percent of its eligible contract dollars to SDBs.<sup>268</sup>

The section 1207 program is set up much like the DBE program. It uses the 8(a) program’s definition of socially disadvantaged individuals – individuals who have been

subjected to racial or ethnic prejudice or cultural bias because of their membership in a group, without regard to their individual qualities.<sup>269</sup> Likewise, the program uses the 8(a) program's definition of economically disadvantaged individuals – socially disadvantaged individuals whose ability to compete has been impaired by diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.<sup>270</sup> In accordance with the 8(d) program, the section 1207 program presumes members of the thirty-seven enumerated minority groups to be socially and economically disadvantaged.<sup>271</sup>

B. *Rothe I through Rothe III*

1. *Rothe I – Based on a minimal review, the district court found the section 1207 program to be constitutional*

In 1998, the Air Force issued a solicitation for competitive bids for telecommunications services at Columbus Air Force Base, Mississippi.<sup>272</sup> The contract was awarded to International Computer and Telecommunications, Inc. (“ICT”), an SDB with annual revenues of approximately \$13 million based in Baltimore, Maryland and owned and operated by two Korean Americans.<sup>273</sup> Rothe Development Corporation (“Rothe”), a non-SDB based in San Antonio, Texas that is owned and operated by a Caucasian female,<sup>274</sup> submitted the lowest actual bid for the contract, \$5.75 million.<sup>275</sup> Through application of the section 1207 program's price-evaluation adjustment, however, Rothe's bid was increased from \$5.75 million to \$6.1 million for purposes of bid selection.<sup>276</sup> As a result, even though its submitted bid was higher than \$5.75 million,

ITC was awarded the contract because it submitted the lowest bid after price-evaluation adjustments were made to all bids.<sup>277</sup>

Rothe sued the DOD alleging, in accordance with *Adarand III*, that the section 1207 program violated its equal protection rights.<sup>278</sup> In 1999, the United States District Court for the Western District of Texas granted the government's motion for summary judgment ("Rothe I").<sup>279</sup>

Stating it would not "dwell unnecessarily on that issue" but "merely briefly consider the congressional findings bearing on the need for remedial action," the court in *Rothe I* quickly concluded that the government had a compelling interest in establishing contract preferences for minority businesses.<sup>280</sup> The court cited no evidence of congressional consideration of discrimination suffered by Asian Americans, and instead placed the burden on Rothe to "offer[ ] . . . evidence that Asian Americans have *not* been discriminated against in the award of government contracts."<sup>281</sup>

The court then analyzed the program to determine if it was narrowly tailored to further the government's compelling interest.<sup>282</sup> After citing minimal evidence and without even analyzing the program for under- or over-inclusiveness, the court found that the section 1207 program was narrowly tailored.<sup>283</sup> The court justified its finding by using broad statements without citing evidence to support them. For example, the court responded to Rothe's contention that the section 1207 program favored racial minorities for whom no history of discrimination had been established by stating simply: "The evidence offered by the Government and by *amici curiae* demonstrates that the minorities preferred in this program reside in the United States and have been discriminated against in the procurement of government contracts. The Court finds this showing sufficient."<sup>284</sup>

2. *Rothe II and Rothe III* – The case is remanded so the section 1207 program can be subjected to strict scrutiny

Rothe appealed the decision, but the United States Court of Appeals for the Fifth Circuit (“*Rothe II*”) held that it lacked jurisdiction and transferred the case to the United States Court of Appeals for the Federal Circuit.<sup>285</sup> In 2001, the Federal Circuit vacated the district court’s decision and remanded the case, holding that the district court had not applied strict scrutiny when analyzing the section 1207 program and had improperly relied on post-reauthorization evidence when determining that the program is constitutional (“*Rothe III*”).<sup>286</sup> Specifically, the court of appeals found that the district court used a “watered-down version of strict scrutiny.”<sup>287</sup> Accordingly, it directed the district court on remand to “undertake the same type of detailed, skeptical, non-deferential analysis” that the Supreme Court used in *Croson*.<sup>288</sup>

a. The district court’s use of mostly post-reauthorization evidence is found insufficient

The court of appeals expressed concern that the district court “engaged in only a cursory analysis of the evidence before Congress at the time of the reauthorization of the 1207 program.”<sup>289</sup> The court stated that a racial classification program is constitutional only if a finding by Congress that remedial action is needed to counter persistent discrimination is supported by a strong basis in evidence in existence at the time of program enactment.<sup>290</sup> Consequently, the district court was told that on remand it must

set forth detailed findings as to the scope and content of reports Congress considered *before* it reauthorized the section 1207 program.<sup>291</sup>

The court of appeals stated that the district court's use of "generalized assertions of legislative purpose" and "statements generally alleging societal discriminatory conduct" provided "little or no probative value in supporting enactment of a race-conscious measure."<sup>292</sup> The court then hit the nail on the head when it described the lack of evidence cited by the district court to support its decision that Congress had found a compelling governmental interest in redressing discrimination against, among others, Asian Pacific Americans in defense procurement actions when it reauthorized the section 1207 program in 1992:<sup>293</sup>

The pre-reauthorization evidence cited by the district court does not show that the 1207 program was designed to address a remedial need, nor does it provide any indication that the 1207 program was enacted in response to systematic discrimination against Asian Pacific Americans or the lingering effects thereof. Moreover, while the SBA's findings support a conclusion that Congress believed there was sufficient evidence upon which to include Asian Pacific Americans in the SBA presumption, such a conclusion, made in 1980, seven years before the initial enactment of the 1207 program and almost twelve years before the time of the reenactment, does not necessarily support a conclusion that Congress had a "strong basis in evidence" for including (and, after 1992, for continuing to include) the presumption in the DOD program.

Of the minimal evidence of discrimination relied on by the district court in making its decision, the majority was post-enactment evidence not considered by Congress during its reauthorization deliberations. The court of appeals stated that the lower court's use of such evidence to uphold the constitutionality of the section 1207 program was improper: "It is axiomatic that a court cannot 'smoke out' illegitimate uses

of race in governmental pronouncements with evidence not available to the governmental body prior to promulgation.”<sup>294</sup> The appeals court based this holding on the Supreme Court’s opinion in *Shaw v. Hunt*,<sup>295</sup> a case in which the plaintiffs alleged that a congressional redistricting plan was impermissible racial gerrymandering.<sup>296</sup> The court of appeals noted that in *Shaw* the Supreme Court emphasized that a reviewing court must assess a racial classification by what “actually” motivated the legislature, not by what “may have motivated it.”<sup>297</sup> The court of appeals directed that on remand, “the district court must reevaluate the constitutional sufficiency of the 1207 program as reauthorized by reliance only on the pre-reauthorization evidence.”<sup>298</sup>

b. Required actions on remand

i. The district court must look beyond general statements of discrimination against minorities

The court in *Rothe III* next outlined how the district had to analyze the section 1207 program using strict scrutiny on remand. It began this discussion by explaining how the program must be analyzed to determine whether the government has a compelling interest. The first step in this analysis is a determination of whether the program was enacted as a remedial measure.<sup>299</sup> If it was not, the analysis need not go any further as the program cannot be constitutional.<sup>300</sup> In making this determination, the court of appeals directed the district court to define the scope of the injury, what remedial measures are necessary to cure the effects of the injury, and whether the measures of the section 1207 impermissibly rely on illegitimate racial prejudice, stereotypes or non-racial factors hindering minority participation.<sup>301</sup>

If a lower court determines that the 1207 program is remedial in nature, the court of appeals stated, the district court next must specify whether the program is a remedy to correct present discrimination or only to counter lingering effects of past discrimination.<sup>302</sup> If the program was enacted primarily in response to past discrimination, the district court will need to determine the current state of the lingering effects and whether the evidence that Congress considered in enacting the program is still relevant and germane.<sup>303</sup>

The court of appeals stated that the district court's next step when conducting the "compelling interest" analysis would be to ensure that the implementation of the section 1207 program was not in response to a few isolated instances of discrimination insufficient to justify a nationwide program.<sup>304</sup> The court of appeals explained this step of the analysis in the following manner:<sup>305</sup>

[T]he district court should determine whether evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups included under the 1207 program. As noted by the *Croson* Court, Congress may not justify a racial preference that benefits all minorities merely by identifying discrimination as to one racial group. In finding the racial preference in *Croson* "grossly overinclusive," the Supreme Court noted that the Richmond City Council had only identified instances of discrimination against blacks, with "absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." *Croson*, 488 U.S. at 506, 109 S.Ct. 706. A racial preference cannot be "remedial" when a disadvantaged minority member must share his or her remedial relief with other minorities that have never been the victim of discrimination. *Id.* Accordingly, Congress must have identified a pattern of discrimination that broadly affected all the minorities who receive a preference under the 1207 program.

Thus, the district court was directed to look beyond general statements of discrimination against “minorities” and analyze the level of discrimination experienced by the five overarching minority groups – African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans.<sup>306</sup>

Citing a footnote in *Adarand VII* – an opinion which, as discussed above, the Supreme Court did not review – the court of appeals did not direct the district court to take the next step and analyze the thirty-seven nationality-based or ethnicity-based minority groups that the SBA presumes are disadvantaged: “Rather than identify instances of discrimination against each particular Asian subgroup (i.e., Korean Americans, Chinese Americans), the district court might properly determine that Congress had before it evidence of discrimination against Asian Pacific Americans in general.”<sup>307</sup> Thus, the court of appeals did not require any critical analysis of how or why the SBA determined which minority groups would be chosen for the presumption of disadvantage, and why other groups that appear to be in the same situation are not afforded the same presumption. This would include, for example, an analysis of why Chinese Americans are presumed disadvantaged, but Americans from countries that border China (such as Russia, Mongolia, Kazakhstan, Kyrgyzstan, Tajikistan, and Afghanistan) are not. While cumbersome, this analysis should be done if programs such as the section 1207 program are truly to be subjected to strict scrutiny.

After accepting without question the government’s determination of which particular groups qualify for the presumption of disadvantage by failing to require that the minority group analysis be conducted at the nation of origin or ethnicity level, the court of appeals somewhat surprisingly directed the district court not to defer “blindly” to

the government's definition of the affected industry but to define the specific industry itself.<sup>308</sup> Accordingly, the district was told to review the evidence on which it relied and make findings as to (1) what the relevant industry was; and (2) whether there was sufficient evidence of discrimination in that industry to justify an application of racial preferences in 1992, 1998, and, if Rothe still is seeking injunctive relief, at the time of the remand proceedings.<sup>309</sup>

Finally, the court of appeals stated the district court's compelling interest analysis should include an overall determination as to whether the evidence is "not merely anecdotal," but sufficiently timely and substantive to support a finding that the section 1207 program is constitutional. Specifically, the court of appeals questioned the district court's use of pre-1982 evidence to determine the constitutionality of the section 1207 program, a program that was reauthorized in 1992, applied to the disputed contract bids in 1998, and from which Rothe was requesting injunctive relief in 2001.<sup>310</sup>

This requirement that the district court use evidence that related closely in time to the issues in dispute addressed a core problem with procurement affirmative action programs – the assumption that if a minority group warrants favorable treatment because in the past it has been unfairly excluded from government contract work, the favorable treatment should remain in effect with no ending point or periodic reevaluations of the status of the group. By using evidence dating prior to 1982, the district court, in effect, based its holding on the assumption that the status of minority groups never change. This makes little sense and is not a strict scrutiny review. It seems imperative that if programs like the section 1207 program are to be found constitutional, the government must

compile and analyze evidence regularly to determine whether the government's compelling interest continues to be present for each of the enumerated minority groups.

- ii. The district court must apply three tests it failed to conduct in *Rothe I* to determine if the section 1207 program is narrowly tailored

The court of appeals next turned to the issue of how the district court was to analyze the section 1207 program to determine whether it is narrowly tailored. The court held that the district court properly analyzed three of the factors necessary to determine narrow tailoring: the flexibility of the program's application, the duration of the program, and the impact the program has on the third parties.<sup>311</sup> The court, however, stated that the district court must also consider three other factors: the efficacy of race-neutral alternatives, the relationship between the goal of five percent participation and the relevant market, and over- and under-inclusiveness.<sup>312</sup>

On remand the district court was directed to conduct a "probing analysis" of the first of the three additional factors, the efficacy of race-neutral alternatives.<sup>313</sup> The court of appeals stated that such an analysis should include a determination of whether the government attempted any race-neutral alternatives prior to reauthorizing the section 1207 program, and, if so, how successful the alternatives were.<sup>314</sup> It also suggested that the district court should make findings as to whether anti-discrimination legislation that preceded the section 1207 program was enforced and, if so, its level of success in dealing with discrimination.<sup>315</sup> Overall, the court of appeals was highly critical of the district court for deferring to congressional findings on the issue rather than conducting a strict scrutiny analysis.<sup>316</sup>

The court of appeals next directed the district court to critically analyze the second additional factor – whether the program’s five percent goal is proportional “to the number of qualified, willing, and able SDBs in the relevant industry group.”<sup>317</sup> To do this, the court of appeals stated that the district court should not rely solely on data complied after the program was reauthorized.<sup>318</sup> It should determine whether there was any evidence produced before the program was reauthorized linking the five percent goal with the number of SDBs, and, if so, whether this evidence was considered by Congress.<sup>319</sup>

Despite the fact the district court conducted no inclusiveness analysis – the third additional factor – the court of appeals was not as stern in its criticism or as detailed in its direction as one would expect when addressing the issue. The court of appeals did not direct the district court to analyze the program’s presumption of disadvantage at the individual nationality or ethnicity level. Instead, as it did when discussing the determination of a compelling interest, the court of appeals stated that the district court could limit its inclusiveness analysis to an examination of the presumption of disadvantage that is granted to small businesses owned by members of the five overarching minority groups.<sup>320</sup> The court of appeals directed the district court to determine whether each of these groups suffer from the lingering effects of discrimination such that inclusion in a defense industry racial preference program is justified.<sup>321</sup> Since the section 1207 program incorporates the 8(d) program’s presumption of social and economic disadvantage, the district court also was directed to determine whether the 8(d) program’s enactment had any constitutional deficiencies.<sup>322</sup> However, the court of appeals gave the district court little guidance on how to incorporate its

findings on the 8(d) program into its holding on remand, stating only that if the district court finds the 8(d) program to be constitutionally defective, it would be “relevant to the court’s analysis.”<sup>323</sup>

- c. *Rothe III* addressed many of *Rothe I*’s faults, but it failed to require an individual review of each of the nationalities and ethnicities presumed disadvantaged

Overall, the court of appeals in *Rothe III* went much further than the court in *Adarand VII* in requiring that a procurement affirmative action program be scrutinized closely to ensure there is sufficient evidence at the time of the program’s enactment and/or reenactment to pass constitutional muster. The court rejected the use of evidence compiled long before or any time after such a program’s enactment or reenactment as justification for the program being found constitutional. The court also mandated that each of the five overarching minority groups be analyzed separately, rejecting a single analysis of all groups that benefit from the program with no distinction being made among those presumed disadvantaged (this is usually found to occur when the term “minorities” is used). While not going far enough, this requirement is critical in the determination of whether there are compelling governmental interests in promoting procurement actions with small businesses owned by members of the listed minority groups and whether a program designed to address such interests is narrowly tailored.

The court in *Rothe III*, however, did not require the district court to analyze the specific nationalities and ethnicities that benefit from the section 1207 program. In light of the manner in which these groups were chosen, the court of appeals’ decision is unfortunate because it again leaves for another day judicial review of the nationality and

ethnicity selection process that the SBA uses. Presumptively treating more favorably a business owned by a relatively wealthy and well-educated Japanese American or Spanish American than one owned by a relatively poor and poorly educated Mongolian American or Appalachian American makes little sense and should be subjected to judicial scrutiny. It most likely will require a Supreme Court opinion on the issue to resolve whether strict scrutiny mandates that such an analysis take place.

## **VII. The University of Michigan admissions cases – *Gratz v. Bollinger* and *Grutter v. Bollinger***

On June 23, 2003, the Supreme Court provided some further insight into how government imposed racial classifications are to be constitutionally analyzed when it decided *Gratz v. Bollinger*<sup>324</sup> and *Grutter v. Bollinger*,<sup>325</sup> opinions that addressed, respectively, the admissions policies of the University of Michigan (“University”) for undergraduate and law students.

Before addressing the Court’s analysis in *Gratz* and *Grutter*, the differences between how race-conscious university admissions policies and race-conscious governmental procurement programs are analyzed must be stressed. First, the Supreme Court stated very plainly that it affords great deference to institutions of higher learning and the admissions policies they choose to implement, because it did not want to infringe on the expansive freedoms of speech and thought to which such institutions are entitled.<sup>326</sup> In addition, unlike the strict guidelines that dictate what companies are presumptively eligible to participate in affirmative action procurement programs, admissions policies used by institutions of higher learning utilize a broad range of

subjective measures that address many issues beyond just the racial and ethnic composition of applicants. Finally, and perhaps most importantly, the asserted governmental compelling interest is different in the two programs – university admissions policies do not attempt to remedy the effects of past discrimination and instead focus on ensuring a diverse student population.<sup>327</sup> Accordingly, the “old boy” networks that the government attempts to counter through its affirmative action procurement programs are not an issue for admissions programs.

A. *Gratz v. Bollinger* – the University’s undergraduate admissions policy is found unconstitutional

In *Gratz*, the petitioners were Caucasian applicants who had been denied admissions to a University undergraduate college, the College of Literature, Science, and the Arts.<sup>328</sup> Although the University’s admissions procedures had changed between the time the applicants filed their applications and when their case reached the Supreme Court, throughout this period the policy of the University was to consider African Americans, Hispanics and Native Americans applicants to be members of “underrepresented minority groups.”<sup>329</sup> The policy of the University when the Supreme Court issued its opinion was to award applicants from these underrepresented minority groups twenty points toward the 100 points necessary for admission to the University.<sup>330</sup> According to the Court, this policy resulted in the University admitting virtually every qualified applicant from an underrepresented minority group.<sup>331</sup>

Chief Justice Rehnquist, joined by Justices O’Connor, Scalia, Kennedy, and Thomas, delivered the opinion of the Court in which the University’s admissions policy

was found to be unconstitutional.<sup>332</sup> Justice Breyer filed a separate opinion concurring in the judgment of the Court, and Justices Stevens, Souter and Ginsburg dissented from the majority opinion.<sup>333</sup>

In applying strict scrutiny to the policy, the Court found that the University has a compelling interest in promoting a diverse student body through the use of racial preferences, and thereby rejected the petitioners' argument that the Supreme Court has only sanctioned the use of racial classifications to remedy identified discrimination.<sup>334</sup> After analyzing whether the University's policy is narrowly tailored to meet its stated interest of promoting a diverse student body, however, the Court found that the University does not have a narrowly tailored admissions policy.<sup>335</sup> It based this finding on the fact an underrepresented minority applicant automatically receives twenty admission points – twenty percent of the amount needed to guarantee admission – without any individualized consideration of the applicant occurring.<sup>336</sup>

In holding that the University's admissions policy was not narrowly tailored, the Supreme Court stated that by awarding twenty points to all applicants from underrepresented minority groups, the University failed to engage in “individualized consideration” of applicants as the Constitution requires.<sup>337</sup> The Court was highly critical of the University's automatic points distribution policy, stating: “The only consideration that accompanies [the University's] distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups.”<sup>338</sup> Continuing its critique, the Court stated that the University's policy made race the decisive factor “for virtually every minimally qualified underrepresented minority applicant.”<sup>339</sup>

The Court made it clear that the University's policy of uniformly treating all members of the underrepresented minority groups favorably was unconstitutional. In explaining what a constitutional admissions policy must contain, the Court gave the example of two underrepresented minority group members, one the child of a successful physician who was raised in an affluent community and the other the child of a poor family who was raised in an unsafe community with little parental support.<sup>340</sup> The Court stated if the University wished to have an admissions policy that awards points to certain applicants based on their race, the policy must take into account environmental factors such as these.<sup>341</sup>

The Court's language was instructive because the Court clearly took issue with a program that blindly affords preferential treatment to members of minority groups with no inquiry as to whether the treatment is warranted. This is comparable to the affirmative action procurement programs discussed above that treat *all* small businesses owned and controlled by members of the enumerated minority groups favorably. For example, the DBE program rebuttably presumes that an individual who is a member of one of these minority groups is disadvantaged without regard to whether that person was raised in relative affluence or in poverty.<sup>342</sup> In addition, there is not any review of the status of the groups that receive and do not receive this presumption to determine whether some groups should be removed and others added to the list. Instead, the presumption is applied mechanically without any individual or system-wide evaluation to determine whether the presumption is warranted. Thus, a Japanese American from Seattle who has not suffered from poverty or discrimination may be presumed to be socially and

economically disadvantaged for purposes of the program, but a Palestinian American from Mississippi who has suffered from both is not given the same presumption.<sup>343</sup>

B. *Grutter v. Bollinger* – the Law School’s policy of admitting a “critical mass” of underrepresented minorities is found constitutional

Unlike its holding concerning the admissions policy for the University’s undergraduate programs, the Supreme Court found that the admissions policy for the University of Michigan Law School (“Law School”) passed constitutional muster in *Grutter*. Justice O’Connor, joined by Justices Stevens, Souter, Ginsburg, and Breyer, delivered the majority opinion in *Grutter*.<sup>344</sup> There were a number of concurring opinions and concurring in part and dissenting in part opinions, with an overall dissenting opinion filed by Chief Justice Rehnquist and joined by Justices, Scalia, Kennedy and Thomas.<sup>345</sup> Thus, a five to four majority upheld the Law School’s policy.

The Court began by determining that the Law School has a compelling interest in attaining a diverse student body.<sup>346</sup> In its compelling interest analysis, the Court found it important that the school’s policy is to enroll a “critical mass” of each underrepresented minority.<sup>347</sup> According to the Court, by having a critical mass of students from these minority groups, the Law School attempts to attain a “meaningful representation” of students from the underrepresented minority groups in an effort to encourage such students to participate in class.<sup>348</sup> In addition, the Court emphasized that percentage goals are not used by the Law School and that enrolling a critical mass or “meaningful numbers” of students from an underrepresented minority group reduces the likelihood that a student from that group will feel out of place, or a token spokesperson for his or her

race.<sup>349</sup> The Court also stressed that an applicant's race is not always a determining factor in the decision whether to admit the applicant, and, in fact, sometimes plays no role in the Law School's decision.<sup>350</sup>

The fact the Law School does not use minority enrollment percentage goals played an integral part in the Court's next finding that "the Law School's admissions program bears the hallmarks of a narrowly tailored plan."<sup>351</sup> It made this finding on the basis of the Law School's critical mass policy, which the Court determined not to be a "quota" because it does not require the school to provide a fixed number or percentage of enrollment opportunities for members of the underrepresented minority groups.<sup>352</sup>

After finding that the Law School does not employ an impermissible quota, the Court next determined that the school's admissions program ensures that applicants are given "individualized consideration" and that race is not the "defining feature" on an application.<sup>353</sup> In making this finding, the Court cited the fact "the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."<sup>354</sup> It also cited the fact "the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity."<sup>355</sup> Based on these findings, the Court concluded, "There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single 'soft' variable."<sup>356</sup>

The Court also determined that the Law School sufficiently considered workable race-neutral alternatives and that the admissions policy does not unduly burden members of racial groups not covered by the policy.<sup>357</sup> Then, in the last part of its "narrowly tailored" analysis, the Court addressed the issue of whether the Law School's policy has a

reasonable durational limit.<sup>358</sup> In analyzing this factor, the Court stated that the durational requirement could be met by a sunset provision or by “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”<sup>359</sup> The Court then found that the policy’s durational limit is constitutional because the Law School “will terminate its race-conscious admissions program as soon as practicable.”<sup>360</sup>

Since the Supreme Court was extremely deferential when evaluating a university’s admissions policy, the holding in *Grutter*, as in *Gratz*, is not easily applicable to an analysis of affirmative action procurement programs. It does, however, give insight into some factors that must be considered when a race-conscious program is constitutionally analyzed.

First, *Grutter* makes it clear that if a race-conscious program has participation goals, the program will be analyzed very closely to determine if the goals are a *de facto* quota system. The DBE program utilizes such goals, with each state required to set DBE participation percentage goals using the detailed process discussed at 49 C.F.R. § 26.45. While the regulations are careful to state that quotas cannot be used in order to achieve these participation goals,<sup>361</sup> as the *Adarand VII* and *Sherbrooke Turf* analyses above address, there are situations in which a prime contractor must award a subcontract to a DBE submitting a higher bid than a non-DBE.<sup>362</sup> This results in a system that appears suspiciously close to imposing a quota.

Second, the Court stressed that a mechanical application of an affirmative action program that grants special treatment to certain minority groups based strictly on race or ethnicity and nothing else weighs against the program being found narrowly tailored. As

such, the policy of federal affirmative action procurement programs to presume disadvantage based solely on race or ethnicity becomes constitutionally suspect.

Finally, the Court stated that the constitutional requirement that a race-conscious program have a reasonable durational limit could be met through periodic reviews to determine how successful the program has been. This raises the question of whether the DBE and section 1207 programs are required under the Constitution to conduct regular status reviews to determine whether all thirty-seven nationalities or ethnicities still warrant a presumption of disadvantage and whether other groups, not currently afforded such a presumption, should be added to the list in order to ensure that they are also given the opportunity to compete fairly and equitably for government contract work.

## **VIII. Conclusion**

Federal affirmative action procurement programs have evolved tremendously since President Roosevelt issued an executive order that prohibited federal government contractors from engaging in discrimination. In the years since that executive order, Congress has implemented affirmative action procurement programs with the best of intentions, but it did not scrutinize them before their enactment to ensure all minority group beneficiaries warranted the programs' special treatment. Too often, Congress and the judiciary have used the term "minorities" to describe the groups that benefit from the programs. This has prevented a detailed examination of each minority group that the programs assist to determine whether the government has a compelling interest in offering each special treatment.

Often portrayed as programs that help African American and Hispanic American small businesses gain an equal opportunity to compete for government contract work, federal affirmative action procurement programs provide favorable treatment to many more minority groups than these two. In fact, as has been stated numerous times in this paper, these programs treat members of thirty-seven nationalities and ethnicities more favorably than the populace as a whole. The SBA selected many of these groups decades ago without first determining that the government had a compelling interest in assisting them obtain government contract work. In addition, the SBA's selection procedure requires advocates for each nationality or ethnicity to initiate the review process, and it places a premium on the advocates' ability to "sell" the group they represent as being disadvantaged. This is the opposite of the way the system should work – the government should initiate periodic reviews of all minority groups that utilize current, government-produced evidence in order to determine objectively which groups are unable to compete fairly for government contract work. Finally, the government has not established any system to evaluate the status of minority groups to determine whether some groups no longer require affirmative action procurement assistance. To assume that a minority group will never improve its status such that it can compete fairly in the marketplace and that it forever more should be presumed disadvantaged, is unjust both to the members of the minority group and the country as a whole.

Since the lower courts have come to divergent conclusions, a definitive determination of whether affirmative action procurement programs are constitutional will not occur until the matter again reaches the Supreme Court. If and when this happens, hopefully the Supreme Court will expound on its holding *Adarand III* and state that strict

scrutiny requires that a program's entire governmental and congressional record be examined for each of the program's minority groups. Such a review most likely would result in parts of the program being found unconstitutional, but would not necessarily result in the entire program being terminated. Instead, it is probable that a court would find that some but not all of the program's minority group beneficiaries need to be removed from the auspices of the program in order for the program to be found to serve a compelling interest and to be narrowly tailored. If this happens consistently as different programs are challenged, the country will end up with far superior affirmative action procurement programs that reserve preferential treatment for those that truly are unable to fairly compete.

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<sup>1</sup> 534 U.S. 103 (2001)

<sup>2</sup> 515 U.S. 200 (1995)

<sup>3</sup> George R. LaNoue & John C. Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 J. PUB. HIST. 439, 456 (1994).

<sup>4</sup> 13 C.F.R. § 124.103(b) (2002).

<sup>5</sup> Id. at § 124.103(d)(1).

<sup>6</sup> Id. at § 124.103(d)(2)(i).

<sup>7</sup> Id. at § 124.103(d)(2)(ii).

<sup>8</sup> 15 U.S.C. § 637(d)(2)(C)(ii) (2002).

<sup>9</sup> 13 C.F.R. § 124.103(d)(2)(iii) (2002).

<sup>10</sup> See *Gratz v. Bollinger*, No. 02-516, 2003 U.S. LEXIS 4801 (U.S.); *Grutter v. Bollinger*, No. 02-241, 2003 U.S. LEXIS 4800 (U.S.).

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<sup>11</sup> See *infra* notes 332-51 and accompanying text.

<sup>12</sup> See *infra* notes 354-56 and accompanying text.

<sup>13</sup> Exec. Order No. 8802, 9 Fed. Reg. 3109 (Jun. 25, 1941). In part, the executive order stated:

I do hereby reaffirm the policy of the United States that there shall be no discrimination in the employment of workers in defense industries or government because of race, creed, color, or national origin, and I do hereby declare that it is the duty of employers and of labor organizations, in furtherance of said policy and of this order, to provide for the full and equitable participation of all workers in defense industries, without discrimination because of race, creed, color, or national origin;

And it is hereby ordered as follows:

1. All departments and agencies of the Government of the United States concerned with vocational and training programs for defense production shall take special measures appropriate to assure that such programs are administered without discrimination because of race, creed, color, or national origin;
2. All contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin;
3. There is established in the Office of Production Management a Committee on Fair Employment Practice, which shall consist of a chairman and four other members to be appointed by the President. The Chairman and members of the Committee shall serve as such without compensation but shall be entitled to actual and necessary transportation, subsistence and other expenses incidental to performance of their duties. The Committee shall receive and investigate complaints of discrimination in violation of the provisions of this order and shall take appropriate steps to redress grievances which it finds to be valid. The Committee shall also recommend to the several departments and agencies of the Government of the United States and to the President all measures which may be deemed by it necessary or proper to effectuate the provisions of this order.

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<sup>14</sup> See Exec. Order No. 10,308, 16 Fed. Reg. 12,303 (Dec. 3, 1951); Exec. Order No. 10,557, 19 Fed. Reg. 5655 (Sep. 3, 1954).

<sup>15</sup> Clark D. Cunningham, et al., *Passing Strict Scrutiny: Using Social Science to Design Affirmative Action Programs*, 90 Geo. L.J. 836, 859 (2002).

<sup>16</sup> *Id.* The Committee listed examples of such other minority groups as “Spanish-Americans, Orientals, Indians, Jews, Puerto Ricans, etc.” *Id.*

<sup>17</sup> Small Business Act of 1953, § 202, 67 Stat. 230, 232 (1953) (current version at 15 U.S.C. § 631 *et seq.*) (1997).

<sup>18</sup> *Id.* at § 207, 67 Stat. at 236.

<sup>19</sup> Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

<sup>20</sup> *Id.* at § 301(1).

<sup>21</sup> ALFRED BLUMROSED, BLACK EMPLOYMENT AND THE LAW 68 (1971).

<sup>22</sup> *Id.*

<sup>23</sup> CUNNINGHAM, ET AL., *supra* note 12, at 860-61.

<sup>24</sup> Civil Rights Act of 1964, § 703, 78 Stat. 241, 255 (1964) (current version at 15 U.S.C. § 2000e-2 (1994)).

<sup>25</sup> *Id.* at § 709(c), 78 Stat. at 263.

<sup>26</sup> Employer Reporting Requirements, 30 Fed. Reg. 14,658 (Nov. 25, 1965).

<sup>27</sup> *Id.*

<sup>28</sup> The debate on the Civil Rights Act of 1964 takes up almost 3,000 pages in the Congressional Record, and it almost exclusively deals with discrimination against African Americans. For example, the debate that occurred over matters involving discriminatory employment practices focused on African Americans and not other minority groups:

The President's Committee on Equal Employment Opportunity reconstituted by Executive Order in early 1961, has, under the leadership of the Vice President, taken significant steps to eliminate racial discrimination by those who do business with the Government. Hundreds of companies – covering 17 million jobs –

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have agreed to stringent non-discriminatory provisions now standard in all Government contracts.

Significant results have been achieved in placing Negroes with contractors who previously employed whites only – and in the elevation of Negroes to a far higher proportion of professional, technical and supervisory jobs.

In addition, the Federal Government, as an employer, has continued to pursue a policy of non-discrimination in its employment and promotion programs. Negro high-school and college graduates are now being intensively sought out and recruited. A policy of not distinguishing on grounds of race is not limited to the appointment of distinguished Negroes -- although they have in fact been appointed to a record number of high policy-making, judicial and administrative posts. There has also been a significant increase in the number of Negroes employed in the middle and upper grades of the career Federal service. In jobs paying \$4,500 to \$10,000 annually, for example, there was an increase of 20% in the number of Negroes during the year ending June 30, 1962 – over three times the rate of increase for all employees in those grades during the year.

Press Release, Office of the White House Press Secretary, The White House Special Message On Civil Rights (Feb. 28, 1963), *available at* <http://www.congresslink.org/civil/cr1.html>.

<sup>29</sup> *Id.*

<sup>30</sup> Recordkeeping and Reporting Requirements Under Title VII, 31 Fed. Reg. 2833 (Feb. 16, 1966) (codified at 29 C.F.R. § 1602.13).

<sup>31</sup> *Id.*; Equal Employment Opportunity Commission, Standard Form 100, Employer Information Report EEO-1, Instruction Booklet (revised Mar. 1997); CUNNINGHAM, ET AL., *supra* note 12, at 860-63.

<sup>32</sup> Small Business Act of 1958 § 8(a), 72 Stat. 389 (1958) (current version at 15 U.S.C. § 631 *et seq.*) (1997) (this Act was an amendment to the Small Business Act of 1953 cited in note 14 *supra*).

<sup>33</sup> Exec. Order No. 11,518, 3 C.F.R. § 907 (1970).

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<sup>34</sup> *Id.*

<sup>35</sup> 13 C.F.R. § 124.8-1(c) (1970).

<sup>36</sup> 13 C.F.R. § 124.8-1(b) (1970); the Fifth Circuit Court of Appeals held for the SBA when the 1970 regulations creating the section 8(a) program were challenged as exceeding the scope of statutory authority. *Ray Baillie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696 (5th Cir. 1973).

<sup>37</sup> 13 C.F.R. § 124.8-1(c) (1970).

<sup>38</sup> *Id.*

<sup>39</sup> 13 C.F.R. § 124.8(c) (1973).

<sup>40</sup> George R. La Noue & John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103, 120 (2000).

<sup>41</sup> Public Works Employment Act of 1977, § 103(f)(2), 91 Stat. 116, 118 (1977) (codified at 42 U.S.C. 6705(f)(2) (1977)).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Fullilove v. Kreps*, 443 F. Supp. 253, 254-55 (S.D.N.Y. 1977).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 263.

<sup>47</sup> *Fullilove v. Kreps*, 584 F. 2d 600, 609 (2d Cir. 1978).

<sup>48</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 491-92 (1980).

<sup>49</sup> *Id.* at 453-95.

<sup>50</sup> *Id.* at 472.

<sup>51</sup> *Id.* at 473.

<sup>52</sup> *Id.* at 472-92.

<sup>53</sup> *Id.* at 490-92.

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<sup>54</sup> *Id.* at 495-517.

<sup>55</sup> *Id.* at 519-22.

<sup>56</sup> Justice Stevens found the program unconstitutional because there was not sufficient justification for the special treatment afforded the minority groups, but he did not come to that conclusion by implementing a particular standard of review. *See id.* at 532-54 (Stevens, J. dissenting).

<sup>57</sup> *Id.* at 522-32.

<sup>58</sup> *Id.* at 486.

<sup>59</sup> *Id.* at 488 n.73.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 522 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 401-02 (1978) (Marshall, J., separate opinion)).

<sup>63</sup> *Id.* at 535 (Stevens, J. dissenting).

<sup>64</sup> *Id.* at 530 (Stewart, J. dissenting).

<sup>65</sup> *Id.* at 494-95 (appendix to opinion of Burger, C.J.)

<sup>66</sup> *Id.* at 494-95 (appendix, para. 3 to opinion of Burger, C.J.)

<sup>67</sup> *See supra* note 4 and accompanying text.

<sup>68</sup> Amendments to the Small Business Investment Act of 1958, Pub. L. No. 95-507, 92 Stat. 1757-73 (1978) (codified in scattered sections of 15 U.S.C.).

<sup>69</sup> *Id.* at § 201, 15 U.S.C. § 631(f)(1)(C) (1980). How Congress determined that these three groups were socially disadvantaged is not entirely clear. For example, the joint conference report offered no explanation for specifically naming Native Americans in addition to Black and Hispanic Americans, only commenting that Native Americans includes “American Indians, Eskimos, Aleuts and Native Hawaiians.” H.R. CONF. REP. 95-1714, at 21 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3879, 3881. This section of the United States Code, 15 U.S.C. § 631(f)(1)(C), currently states, “such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Asian

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Pacific Americans, Native Hawaiian Organizations, and other minorities.” 15 U.S.C. § 631(f)(1)(C) (2002).

<sup>70</sup> *Id.* at § 202, 15 U.S.C. § 637(a)(1)(A)-(B) (1980).

<sup>71</sup> *Id.*, 15 U.S.C. § 637(a)(4)(A) (1980).

<sup>72</sup> 13 C.F.R. § 124.105(b)(1) (1980).

<sup>73</sup> 13 C.F.R. § 124.105(c) (1980).

<sup>74</sup> 13 C.F.R. § 124.106(a) (1980).

<sup>75</sup> *Id.* at § 211, 15 U.S.C. § 632(b) (1980).

<sup>76</sup> *Id.* at § 211, 15 U.S.C. § 637(d)(2)-(3) (1980).

<sup>77</sup> *Id.* at § 211, 15 U.S.C. § 637(d)(4)-(10) (1980).

<sup>78</sup> *Id.* at § 221, 15 U.S.C. § 644(g) (1980).

<sup>79</sup> *Id.* at § 211-21 (codified in scattered sections of 15 U.S.C.).

<sup>80</sup> 13 C.F.R. §§ 124.111(c)-(d), 124.601-124.609 (1980).

<sup>81</sup> See S. REP. No. 95-1070 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3835; S. REP. No. 95-1140 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3866; H.R. CONF. REP. No. 95-1714 (1978) *reprinted in* 1978 U.S.C.C.A.N. 3879.

<sup>82</sup> Small Business Development Center Act of 1980, § 118, 94 Stat. 833, 840 (1980) (codified at 15 U.S.C. 637(d)(3)(c)(ii) (2002)). See S. REP. No. 96-703 (1980) *reprinted in* 1980 U.S.C.C.A.N. 2340 and H.R. CONF. REP. No. 96-1087 (1980) *reprinted in* 1978 U.S.C.C.A.N. 2352. The legislative history offers no explanation for the addition of Asian Pacific Americans, merely stating that members of the minority group are to be added to the list of those considered socially disadvantaged. *Id.*

<sup>83</sup> *Id.* at § 202(a).

<sup>84</sup> 13 C.F.R. § 124.105(d)(2)(i-iii) (1980).

<sup>85</sup> 45 Fed. Reg. 42,832 (Apr. 9, 1980); GEORGE R. LANOUÉ & JOHN C. SULLIVAN, *supra* note 3, at 449. In 1987, a petition to add Iranian Americans to the list of socially disadvantaged minority groups was likewise rejected by the SBA, which decided the issue without comments even being solicited in the *Federal Register*. GEORGE R.

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LANOUE & JOHN C. SULLIVAN, *supra* note 3, at 456-59; *see supra* note 3 and accompanying text.

<sup>86</sup> Exec. Order No. 11,458, 34 Fed. Reg. 4937 (Mar. 5, 1969).

<sup>87</sup> Exec. Order No. 11,625, 3 C.F.R. § 616 (1971-1975).

<sup>88</sup> 15 C.F.R. § 1400.1(c) (1972). Hasidic Jews continue to be listed among the minority groups deemed socially and economically disadvantaged for MBDA purposes. 15 C.F.R. § 1400.1(c) (2002).

<sup>89</sup> Minority Small Business and Capital Ownership Development Assistance; Designation of Minority Group Eligibility of Asian Indian Americans, 47 Fed. Reg. 36,743-01 (Aug. 23, 1982).

<sup>90</sup> *Id.*

<sup>91</sup> Minority Small Business and Capital Ownership Development Assistance; Minority Group Consideration; Asian Indian Americans, 47 Fed. Reg. 21,372-01 (May 18, 1982).

<sup>92</sup> *See* Minority Small Business and Capital Ownership Development Assistance; Designation of Minority Group Eligibility of Asian Indian Americans, 47 Fed. Reg. at 36,743-01.

<sup>93</sup> Minority Small Business and Capital Ownership Development Assistance; Minority Group Consideration; Asian Indian Americans, 47 Fed. Reg. at 21,372-01.

<sup>94</sup> *See supra* note 67 and accompanying text.

<sup>95</sup> Minority Small Business and Capital Ownership Development Program, 54 Fed. Reg. 34,692 (Aug. 21, 1989) (codified at 13 C.F.R. § 124.105 (1990)).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> 488 U.S. 469 (1989).

<sup>101</sup> *Id.* at 477-78.

<sup>102</sup> *Id.* at 478.

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 478-79.

<sup>105</sup> *Id.* at 481-83.

<sup>106</sup> *Id.* at 483-85.

<sup>107</sup> *Id.* See *J.A. Croson Co. v City of Richmond*, 779 F.2d 181 (4th Cir. Va. 1985); see also *supra* notes 46-50 and accompanying text.

<sup>108</sup> *Id.* at 485. *Wygant v. Jackson Board of Educ.*, 476 U.S. 267 (1986).

<sup>109</sup> *Wygant*, 476 U.S. at 273-74.

<sup>110</sup> *J.A. Croson Co.*, 488 U.S. at 485. See *J.A. Croson Co. v City of Richmond*, 822 F.2d 1355 (4th Cir. Va. 1987).

<sup>111</sup> *J.A. Croson Co.*, 488 U.S. at 476-511.

<sup>112</sup> *Id.* at 520-28.

<sup>113</sup> *Id.* at 498-506.

<sup>114</sup> *Id.* at 506.

<sup>115</sup> See *supra* notes 38-40 and accompanying text.

<sup>116</sup> Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132 (codified as amended in scattered sections of 23 U.S.C.) (1987).

<sup>117</sup> Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2138 (codified as amended in scattered sections of 23 U.S.C.) (1982).

<sup>118</sup> Surface Transportation and Uniform Relocation Assistance Act of 1987 §106(c), 101 Stat. 132, 145-46 (1987).

<sup>119</sup> Intermodal Surface Transportation Efficiency Act of 1991 §1003(b), Pub. L. No. 102-240, 105 Stat. 1914, 1923 (1991).

<sup>120</sup> Transportation Equity Act for the 21st Century § 1101(b), Pub. L. No. 105-178, 112 Stat. 107, 113 (1998).

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<sup>121</sup> Surface Transportation and Uniform Relocation Assistance Act of 1987 §106(c)(2)(B), 101 Stat. 132, 145.

<sup>122</sup> H.R. CONF. REP. No. 100-27, at 148 (1987), *reprinted in* 1987 U.S.C.C.A.N. 121, 132.

<sup>123</sup> Surface Transportation and Uniform Relocation Assistance Act of 1987 § 106(c)(4), 101 Stat. 132, 145.

<sup>124</sup> 49 C.F.R. § 23.62 (1989).

<sup>125</sup> *Id.* at § 23.69.

<sup>126</sup> 13 C.F.R. § 105(c)(1) (1989).

<sup>127</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 205 (1995).

<sup>128</sup> *See supra* notes 73-74 and accompanying text.

<sup>129</sup> *Id.* at 208. As a result of the name of this clause, the DBE program also became known as the SCC program.

<sup>130</sup> *Id.* at 209. If the prime awards only one DBE subcontract, the maximum amount of compensation is 1.5 percent of the total prime contract. *Id.*

<sup>131</sup> *Id.* at 205.

<sup>132</sup> *Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556, 1567 (D. Colo. 1997).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Adarand Constructors, Inc. v. Skinner*, 790 F. Supp. 240 (D. Colo. 1992)

<sup>136</sup> *Id.* at 244-45.

<sup>137</sup> *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537 (10th Cir. 1994). The court of appeals stated, “The lesson that we glean from *Fullilove* and *Croson* is that the federal government, acting under congressional authority, can engage more freely in affirmative action than states and localities.” *Id.* at 1545.

<sup>138</sup> 512 U.S. 1288 (1994).

<sup>139</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. at 203.

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<sup>140</sup> *Id.* at 235-39.

<sup>141</sup> *Id.* at 213-17, 235.

<sup>142</sup> *Id.* at 237. In his concurring opinion, Justice Scalia felt strongly that the program could not survive strict scrutiny, but agreed to remand the case to the lower courts to resolve the issue, “It is unlikely, if not impossible, that the challenged program would survive under this understanding of strict scrutiny, but I am content to leave that to be decided on remand.” *Id.* at 239.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 271-274 nn.1-8 (Ginsburg, J., dissenting).

<sup>145</sup> 965 F.Supp. 1556, 1584 (D. Colo. 1997).

<sup>146</sup> *Id.* at 1569-84.

<sup>147</sup> *Id.* at 1580.

<sup>148</sup> *Id.* at 1581 n.17.

<sup>149</sup> *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292, 1296 (10th Cir. 1999).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* Instead of a presumption of disadvantage, the new procedure for being certified as a DBE called for an applicant company to certify that each of the firm’s majority owners had experienced social disadvantage based upon the effects of racial, ethnic or gender discrimination. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 220 (2000). It is not clear what discrimination the ownership of Adarand believed it had experienced. The practical effect of certifying a company like Adarand as being a DBE was to make the DBE program meaningless because seemingly any small company could qualify for such status.

<sup>152</sup> *Adarand Constructors, Inc. v. Slater*, 169 F.3d 1292 (10th Cir. 1999).

<sup>153</sup> *Id.* at 1298-99.

<sup>154</sup> *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000).

<sup>155</sup> *Id.* at 224.

<sup>156</sup> *Id.* at 222-23.

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<sup>157</sup> *Id.* at 222; *see* 49 C.F.R. § 26.67(a)-(d) (1999).

<sup>158</sup> *Id.* at 223.

<sup>159</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 1160.

<sup>162</sup> Adarand, despite not having been granted certiorari on the issue, argued at the Supreme Court that the court of appeals decision not to grant it standing to challenge the 8(d) program was in error. This argument and the fact Adarand did not contest the court of appeals' decision on the DBE program itself, led the Supreme Court to dismiss as improvidently granted the writ of certiorari it had previously granted. *See infra* notes 217-23 and accompanying text.

<sup>163</sup> *Id.* at 1159.

<sup>164</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995).

<sup>165</sup> *See supra* notes 113-19 and accompanying text. *See also supra* note 141 and accompanying text, which discusses the fact Justice Ginsburg's dissent was based partly on discrimination experienced by women.

<sup>166</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1159 (10th Cir. 2000).

<sup>167</sup> *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1543 (10th Cir. 1994) (emphasis added).

<sup>168</sup> *Id.*

<sup>169</sup> *Adarand Constructors, Inc.*, 515 U.S. at 211.

<sup>170</sup> *Id.*

<sup>171</sup> *Adarand Constructors, Inc.*, 515 U.S. at 247 (Stevens, J., dissenting). *See supra* note 52 and accompanying text for an explanation of intermediate scrutiny.

<sup>172</sup> *Adarand Constructors, Inc.*, 228 F.3d at 1164.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1167.

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<sup>175</sup> *Id.* at 1167-68.

<sup>176</sup> *Id.* at 1168.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1168-72.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1170 (quoting Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,058 (May 23, 1996)).

<sup>183</sup> *Id.* at 1168-72.

<sup>184</sup> *Id.* at 1172-74.

<sup>185</sup> *Id.* at 1175.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 1176 n.18.

<sup>189</sup> *Id.* at 1177-78.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 1178.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1178-79.

<sup>194</sup> *Id.* at 1178-79 (citing 49 C.F.R. § 26.51 (2000)).

<sup>195</sup> *Id.* at 1179.

<sup>196</sup> *Id.* at 1179-80.

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<sup>197</sup> *Id.* at 1179-80.

<sup>198</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 238 (1995).

<sup>199</sup> See *supra* note 145 and accompanying text.

<sup>200</sup> *Adarand Constructors, Inc.*, 228 F.3d at 1186-87 (citing 13 C.F.R. § 124.104(c)(2) (2000); 48 C.F.R. § 19.001 (2000); 49 C.F.R. §§ 26.65, 26.67(b) (2000); and 48 C.F.R. § 19.1014 (2000)).

<sup>201</sup> Transportation Equity Act for the 21st Century § 1101(b)(2)(B), Pub. L. No. 105-178, 112 Stat. 107, 113 (1998).

<sup>202</sup> 15 U.S.C. 637(d)(3)(C) (2002).

<sup>203</sup> *Adarand Constructors, Inc.*, 228 F.3d at 1185-86.

<sup>204</sup> *Id.* at 1183-84.

<sup>205</sup> *Id.* at 1184.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 1185.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* (citing 48 C.F.R. § 19.001 (2000); 13 C.F.R. § 124.1002(a) (2000); 48 C.F.R. § 19.703 (2000); 48 C.F.R. § 52.219-8 (2000); 13 C.F.R. § 124.104(b)(1) (2000); 49 C.F.R. § 26.67(b)(1) (2000); 49 C.F.R. § 26.65(b) (2000)).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* at 1180-81. Of course, a prime contractor would be foolish not to take advantage of the compensation clause, and one can assume it usually is the deciding factor, as it was in the *Adarand* cases, when a prime contractor decides whether to award a DBE a subcontract

<sup>212</sup> See 49 C.F.R. Part 26 app. A (2002).

<sup>213</sup> 49 C.F.R. Part 26 app. A (I) (2002).

<sup>214</sup> *Id.* at (IV)(D) (2).

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<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1181.

<sup>217</sup> *Id.* at 1181-82.

<sup>218</sup> *Id.* at 1181. In addition to its finding that *Adarand* did not have standing to independently challenge the goals, the court also found that such a challenge was outside the scope of *Adarand III*'s remand. *Id.* at 1181-82.

<sup>219</sup> Despite this fact, the regulations also describe the DBE program's ten percent participation goal as "aspirational." *See* 26 C.F.R. § 26.41 (2002).

<sup>220</sup> *Adarand Constructors, Inc.*, 228 F.3d at 1182 (citing 49 C.F.R. § 26.45(b) (2000)).

<sup>221</sup> *Id.* at 1182 (citing 49 C.F.R. § 26.47(a) (2000)).

<sup>222</sup> *See supra* notes 209-11 and accompanying text.

<sup>223</sup> *Id.* at 1183.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (citing 49 C.F.R. §§ 26.33(a), 26.61(d), 26.67(d) (2000); 13 C.F.R. § 124.105(c)(1) (2000)).

<sup>226</sup> *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941 (2001); *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001)

<sup>227</sup> *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 105-08 (2001).

<sup>228</sup> *Id.* at 108.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at 108-10.

<sup>233</sup> *See supra* notes 198-99 and accompanying text.

<sup>234</sup> In *Klaver Constr. Co., Inc. v. Kansas Dep't of Transp.* 211 F. Supp. 2d 1296 (D. Kan. 2002), the United States District Court for the District of Kansas granted the

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government's motion to dismiss holding that the plaintiff contractor did not have standing to challenge the DBE program. In that case, the plaintiff bid over \$84,000 less than a certified DBE on two subcontract bids, but, "because of the DBE goals," "[the prime contractor] was forced to use [the DBE's] quote for the work." *Id.* at 1300. It granted the motion to dismiss despite finding that: (1) the plaintiff lost subcontract work as a result of the program; (2) Kansas will continue to let federal-aid highway contracts with DBE participation goals; and (3) the plaintiff will bid on such contracts in the future. *Id.* at 1300-02. In holding for the government, the court found that the plaintiff suffered its alleged injury not because it is non-minority owned, but because it is too large a company and its owner too wealthy an individual to qualify under DBE's economic restrictions. *Id.* Amazingly, the court did not cite to any of the *Adarand* decisions in its opinion.

<sup>235</sup> No. 00-CV-1026(JMR/RE), 2001 U.S. Dist. LEXIS 19565 (D. Minn. 2001).

<sup>236</sup> *Id.* at \*2-\*9. The opinion provides no information on what bases the two companies that were awarded the contracts in dispute qualified for DBE certification.

<sup>237</sup> *Id.* at \*2-\*10.

<sup>238</sup> *Id.* at \*2.

<sup>239</sup> *Id.* at \*11 n.1. *See supra* notes 118-19 and 158-68 and accompanying text.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.* at \*16.

<sup>242</sup> *Id.* at \*16-\*17.

<sup>243</sup> *Id.* at \*18-\*19.

<sup>244</sup> *Id.* at \*19 (emphasis added).

<sup>245</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995).

<sup>246</sup> *Sherbrooke Turf, Inc.*, 2001 U.S. Dist. LEXIS 19565, at \*20-\*30.

<sup>247</sup> *Id.* at \*21.

<sup>248</sup> *Id.* (citing H.R. REP. NO. 105-467, pt. 1, at 504-05 (1998)).

<sup>249</sup> *Id.* at \*21-\*22. *See supra* notes 190-91 and accompanying text which address the court of appeal's discussion of 49 C.F.R. § 26.51 in *Adarand VII*.

<sup>250</sup> *Id.* at \*22.

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<sup>251</sup> *Id.* at \*24.

<sup>252</sup> *Id.* at \*25 (emphasis added).

<sup>253</sup> *Id.* (citing, as did the court in *Adarand VII*, 49 C.F.R. §§ 26.61(d) 26.67(d) (2000); 13 C.F.R. § 124.105(c)(1) (2000)).

<sup>254</sup> *Id.* at \*25-\*26 (citing 49 C.F.R. § 26.33 (2002)).

<sup>255</sup> *Id.* at \*26.

<sup>256</sup> *Id.* at \*26-\*27 (citing 49 C.F.R. §§ 26.43, 26.45, 26.47 (2002)).

<sup>257</sup> See *supra* notes 208-15 and accompanying text.

<sup>258</sup> *Id.* at \*28.

<sup>259</sup> *Id.* at \*29. (citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1185-86 (10th Cir. 2000)). In this section of its opinion, the section in which it determined that no minority groups were unconstitutionally included in the program, the *Sherbrooke* court did not cite or analyze any evidence of discrimination experienced by any of the five overarching minority groups – African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans – let alone the thirty-seven nationalities or ethnicities presumed disadvantaged. It explained its decision not to evaluate the level of discrimination experienced by the thirty-seven minority groups in the following manner, “[E]xtrapolating findings of discrimination against Native Americans, Asian-Pacific Americans, and Asian-Americans to include Aleuts, Samoans, and Bhutanese respectively, is more a question of nomenclature than of narrow tailoring.” *Id.* However, without evidence that Aleuts, Samoans, and/or Bhutanese have been discriminated against such that their presumed inclusion in the program is warranted, it does not seem possible that a court can determine that the DBE program is narrowly tailored.

<sup>260</sup> 61 Fed. Reg. 26,042, 26,050 (May 23, 1996). Instead of correctly crediting the compilation found in the public notice’s appendix to the DOJ, the court wrongly states that Congress compiled the data.

<sup>261</sup> *Sherbrooke Turf, Inc.*, 2001 U.S. Dist. LEXIS 19565, at \*16 (quoting The Compelling Interest for Affirmative Action: A Preliminary Survey, 61 Fed. Reg. at 26,062).

<sup>262</sup> *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995).

<sup>263</sup> *Id.* at 223.

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<sup>264</sup> National Defense Authorization Act of 1987 § 1207, Pub. L. No. 99-661, 100 Stat. 3859, 3973 (1987) (codified as amended at 10 U.S.C. 2323 (2002)). Excluding the value of the individual's place of business and personal residence, an owner of a SDB cannot have a net personal worth exceeding \$750,000. 13 C.F.R. § 124.104(c)(2) (2002).

<sup>265</sup> *Id.* at § 1207(e)(3).

<sup>266</sup> 48 C.F.R. subpart 219.10 (1989).

<sup>267</sup> National Defense Authorization Act for Fiscal Years 1990 and 1991 § 831(b), Pub. L. No. 101-189, 103 Stat. 1352, 1507 (1989) (codified as amended at 10 U.S.C. 2323 (2002)); National Defense Authorization Act for Fiscal Year 1993 § 801(a)(1)(B), Pub. L. No. 102-484, 106 Stat. 2315, 2442 (1992) (codified as amended at 10 U.S.C. 2323 (2002)); National Defense Authorization Act for Fiscal Year 2000 § 808, Pub. L. No. 106-65, 113 Stat. 512, 705 (1999) (codified as amended at 10 U.S.C. 2323 (2002)).

<sup>268</sup> Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 § 801, Pub. L. No. 105-261, 112 Stat. 1920, 2080-81 (1998) (codified as amended at 10 U.S.C. 2323(e)(3)(B) (2002)). The 1207 program has been suspended since February 24, 1999 because the DOD has exceeded the five percent goal for contract awards to SDBs for fiscal years 1998 through 2002. If the five percent goal is not met in fiscal year 2003, the suspension period will end February 23, 2004. See Memorandum from Colonel Dave Kerrins, Jr., Acting Director of Defense Procurement, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, to assorted offices within the Department of Defense (Jan. 25, 2000), *available at* <http://www.fedgovcontracts.com/pe00-30.htm>; Memorandum from Deidre A. Lee, Director Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, to assorted offices within the Department of Defense (Jan. 25, 2001), *available at* <http://www.acq.osd.mil/dp/dars/deviations/2001o0001.pdf>; Memorandum from Deidre A. Lee, Director Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, to assorted offices within the Department of Defense (Jan. 31, 2002), *available at* [http://www.acq.osd.mil/dp/dars/deviations/2002\\_O0002.pdf](http://www.acq.osd.mil/dp/dars/deviations/2002_O0002.pdf); Memorandum from Deidre A. Lee, Director Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisition, Technology and Logistics, to assorted offices within the Department of Defense (Jan. 24, 2003), *available at* [http://www.acq.osd.mil/dp/dars/deviations/2003\\_o0001.pdf](http://www.acq.osd.mil/dp/dars/deviations/2003_o0001.pdf).

<sup>269</sup> 15 U.S.C. § 637(a)(5) (2002).

<sup>270</sup> 15 U.S.C. § 637(a)(6)(A) (2002).

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<sup>271</sup> 10 U.S.C. § 2323(a)(1)(A) (2002); 15 U.S.C. § 637(d)(3)(C) (2002); 13 C.F.R. § 124.103(b) (2002); *see supra* note 4 and accompanying text for the list of minority groups to which the presumption of social and economic disadvantage is applied.

<sup>272</sup> *Rothe Dev. Corp. v. U.S. Dep’t. of Def.*, 262 F.3d 1306, 1315 (Fed. Cir. 2001).

<sup>273</sup> *Id.*

<sup>274</sup> If this dispute had involved a highway construction contract under the DBE program instead of a DOD services contract under the 1207 program, the plaintiff company possibly would have enjoyed a presumption of disadvantage as a woman-owned small business. *See supra* notes 118-19 and accompanying text. This fact highlights a problem with the federal government’s affirmative action procurement programs – without any congressional consideration of the disparity, women-owned small businesses are treated preferentially in the highway construction industry but not in other industries (such as the communications services industry). This might make sense if Congress had considered different industries and determined that women-owned small businesses are only at a disadvantage in the highway construction industry, but this is not the case. As discussed *supra* in the section addressing the DBE program, instead of engaging in such consideration, Congress just added women to the list of those presumed to be disadvantaged for purposes of the DBE program with little evidence to justify the decision.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Id.* at 1316.

<sup>280</sup> *Rothe Dev. Corp. v. U.S. Dep’t. of Def.*, 49 F. Supp. 2d 937, 945-49 (W. D. Tex. 1999). The court began its compelling interest analysis by stating, “No court considering the statutory scheme that forms the basis for Rothe’s claim has rejected the Government’s assertion that it had a compelling purpose in establishing contract preferences for minority businesses, and this Court will not be the first to do so.” *Id.* at 945.

<sup>281</sup> *Id.* at 946 (emphasis added).

<sup>282</sup> *Id.* at 949-54.

<sup>283</sup> *Id.*

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<sup>284</sup> *Id.* at 953.

<sup>285</sup> *Rothe Dev. Corp. v. U.S. Dep't. of Def.*, 194 F.3d 622 (5th Cir. 1999).

<sup>286</sup> *Rothe Dev. Corp. v. U.S. Dep't. of Def.*, 262 F.3d at 1332.

<sup>287</sup> *Id.* at 1321.

<sup>288</sup> *Id.* at 1321-22.

<sup>289</sup> *Id.* at 1322. The court of appeals was so critical of the district court's discussion of the evidentiary record that it found it insufficient to determine if Congress even had a *rational basis* for enacting the 1207 program, let alone whether it would survive intermediate or strict scrutiny, “[T]he evidentiary record, as presented by the district court, might, we think, be insufficient even if we evaluated the 1207 program under the more lenient standard of rational basis scrutiny, whereby a classification would be upheld so long as there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Id.* at 1324 n.17.

<sup>290</sup> *Id.* at 1322-23.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* at 1323.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 1327.

<sup>295</sup> *Shaw v. Hunt*, 517 U.S. 899 (1996).

<sup>296</sup> *Rothe Dev. Corp. v. U.S. Dep't. of Def.*, 262 F.3d at 1326-27.

<sup>297</sup> *Id.* at 1327 (quoting *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996)).

<sup>298</sup> *Id.* at 1328. The court of appeals explained its directive to the district court in the following manner, “If [ ] pre-authorization evidence is insufficient to maintain the program when the program is challenged as reauthorized, the program must be invalidated, regardless of the extent of post-authorization evidence.” *Id.* at 1327-28.

<sup>299</sup> *Id.* at 1329.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

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<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 1330.

<sup>305</sup> *Id.*

<sup>306</sup> See 15 U.S.C. § 637(d)(3)(C) (2002).

<sup>307</sup> *Rothe Dev. Corp. v. U.S. Dep't. of Def.*, 262 F.3d at 1330 (citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1176 n.18 (10th Cir. 2000)).

<sup>308</sup> *Id.*

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at 1330-31.

<sup>311</sup> *Id.* at 1331.

<sup>312</sup> *Id.* at 1331-32.

<sup>313</sup> *Id.* at 1331.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

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<sup>324</sup> *Gratz v. Bollinger*, No. 02-516, 2003 U.S. LEXIS 4801 (U.S.).

<sup>325</sup> *Grutter v. Bollinger*, No. 02-241, 2003 U.S. LEXIS 4800 (U.S.).

<sup>326</sup> See *Grutter*, 2003 U.S. LEXIS 4800, at \*37-\*38, in which the Court states that its holdings on the University's undergraduate and law school admissions policies are "in keeping with [its] tradition of giving a degree of deference to a university's academic decisions," and are based on the Court's recognition that "universities occupy a special niche in our constitutional tradition" because of "the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment."

<sup>327</sup> See *id.* at \*35-\*36, in which the Court found it important to begin its strict scrutiny analysis by stating the University's only justification for its use of race in the admissions process was to obtain a more diverse student body and that the University asserted it was not using its admissions program as a remedy for discrimination – the stated compelling interest of affirmative action procurement programs. To examine the differences between the University's compelling interest of obtaining a more diverse student body and the DBE program's compelling interest of remedying the discriminatory barriers that have prevented minority groups from fairly competing in the subcontracting industry, see *supra* notes 169-182 and accompanying text, in which the court of appeal's compelling interests analysis in *Adarand VII* is discussed.

<sup>328</sup> *Gratz*, 2003 U.S. LEXIS 4801, at \*11-\*13.

<sup>329</sup> *Id.* at \*16-\*22.

<sup>330</sup> *Id.* at \*20-\*22.

<sup>331</sup> *Id.* at \*17.

<sup>332</sup> *Id.* at \*10-\*12.

<sup>333</sup> *Id.* at \*10-\*11.

<sup>334</sup> *Id.* at \*43.

<sup>335</sup> *Id.* at \*46-\*49.

<sup>336</sup> *Id.*

<sup>337</sup> *Gratz*, 2003 U.S. LEXIS 4801, at \*47-\*49.

<sup>338</sup> *Id.* at \*48.

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<sup>339</sup> *Id.* at \*48-49.

<sup>340</sup> *Id.* at \*49-\*55.

<sup>341</sup> *Id.*

<sup>342</sup> 49 C.F.R. § 26.67(a) (2002).

<sup>343</sup> In fact, Justice Ginsburg in her dissent defends the University's policy – a policy that does not include Asian Americans among the minority groups considered underrepresented – by pointing out that the percentages of African Americans and Hispanics living in poverty are twice as high as the percentage of Asian Americans. *Gratz*, 2003 U.S. LEXIS 4801, at \*98 n.2. Statistics such as these would seem to be equally relevant in evaluating whether Asian Americans should be presumed disadvantaged for purposes of affirmative action procurement programs.

<sup>344</sup> *Gratz*, 2003 U.S. LEXIS 4801, at \*11.

<sup>345</sup> *Id.* at \*12.

<sup>346</sup> *Id.* at \*37. The Court not only determined that the Law School has a compelling interest in attaining a diverse student body, it endorsed the compelling interest itself, stating, “ . . . [in the Court’s] view attaining a diverse student body is at the heart of the Law School’s proper institutional mission . . . ” *Id.* at \*38-39.

<sup>347</sup> *Id.* at \*39.

<sup>348</sup> *Id.* at \*19. The Court justified its finding that there was a compelling interest in attaining a diverse student body in a lengthy discussion of the “substantial” benefits of enrolling a critical mass of underrepresented minority students. *Id.* at \*39-\*44. According to the Court, these benefits include: advancing cross-racial understanding; breaking down racial stereotypes; promoting livelier, more spirited, more enlightened and more interesting classroom discussions; preparing students for an increasingly diverse workforce and society; ensuring national security by assisting universities’ Reserve Officer Training Corps produce a highly qualified and racially diverse officer corps; encouraging members of all races to participate in the civic life of our Nation; and developing future national political and judicial leaders. *Id.*

<sup>349</sup> *Id.* at \*19.

<sup>350</sup> *Id.* at \*20.

<sup>351</sup> *Id.* at \*47.

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<sup>352</sup> *Id.* at \*48.

<sup>353</sup> *Id.* at \*51-\*52.

<sup>354</sup> *Id.* at \*52.

<sup>355</sup> *Id.* at \*52.

<sup>356</sup> *Id.*

<sup>357</sup> *See id.* at \*56-\*61.

<sup>358</sup> *Id.* at \*60-\*63.

<sup>359</sup> *Id.* at \*61.

<sup>360</sup> *Id.* at \*62-\*63. Justice O'Connor does not explain the inconsistency between her finding constitutional the Law School's plan to terminate its race-conscious admissions program as soon as practicable and her statement that the Constitution's durational limit requirement can be met by: (1) a sunset provision or (2) periodic reviews of the Law School's racial diversity levels. As can be seen, the Law School's policy does not implement either option. Chief Justice Rehnquist's dissent takes her to task for this contradiction, stating: "These discussions of a time limit are the vaguest of assurances. In truth, they permit the Law School's use of racial preferences on a seemingly permanent basis. Thus, an important component of strict scrutiny – that a program be limited in time – is casually subverted." *Id.* at \*83.

<sup>361</sup> 49 C.F.R. § 26.43(a) (2002).

<sup>362</sup> *See supra* notes 211-14 and 250-51 and accompanying text.